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Appeal

Commission granted appeal barring discovery of materials protected by work product doctrine and attorney-client privilege.
—*RKO General, Inc. (KHJ-TV)*
Docket No. 16679

Application, for Review

Application for review of Mass Media ruling which denied Fairness Doctrine complaint denied. Only where an issue is found to be of critical importance to a particular community would a question be raised as to whether a licensee had fulfilled its obligation under the first part of Fairness Doctrine.
—*Brent Buell, et al.*

CATV Cross Ownership by B/cer

Petition for issuance of Order to Show Cause, Declaratory Ruling, and/or other appropriate relief of an agreement between Chris-Craft Industries, Inc. and Warner Communications, Inc. granted to an extent and otherwise denied. Commission requested joint report on divestment problem and concluded that public interest does not require further action at this time.
—*News International, PLC*

Section 76.501(b)(2) amended to grandfather all existing non-egregious co-owned, co-located cable/broadcast television cases, action deferred for those situations defined as egregious pending the conclusion of a general rulemaking proceeding involving Section 76.501.
—*CATV Cross Ownership*
Docket No. 20423

Channel Assignment

Memorandum Opinion and Order adopted denying all petitions for reconsideration except one. Commission will provide a protective buffer zone of a 16 - kilometer (10 mile) radius in addition to the normal distance separation requirements, to existing Class C stations currently operating with antenna heights of less than 300 meters (984 feet) above average terrain for three year period commencing April 19, 1984.
—*FM B/c Assignments*
BC Docket No. 80-90

Character Qualifications

In hearing matter of mutually exclusive CP applications for AM station, Review Board affirmed ALJ's grant. Board agreed with the ALJ that a drug issue was not a factor in the proceeding and that none of the proposals is entitled to a dispositive Section 307(b) preference.
—Alan K. Levin
BC Docket No. 80-712

Common Carrier

Commission granted authority to the Communications Satellite Corporation to construct a satellite earth station at the Teleport complex, Staten Island, New York and to operate it with INTELSAT satellites for the provision of International Business Service.
—COMSAT

Commission granted authority to construct and operate international earth stations to provide INTELSATs' International Business Service to area businesses, conditioned on the outcome of the *Notice of Proposed Rulemaking* in Docket No. 82-540.
—International Relay, Inc.

Common Carrier, International

Application of Comsat to provide space segment facilities as part of INTELSAT Business Services program granted since found to be in the public interest. Authorization will facilitate the establishment of international digital business networks.
—COMSAT

Common Carrier, Operating, Expenses

Commission denied petition for reconsideration of approval of AT&T's request to capitalize separate subsidiary to offer cellular communications services. Subsidiary not required to record on its books of account preoperational expenditures borne by former affiliates.
—AT&T Co.

Common Carrier, Rates, Charges, See Also Tariffs

Commission adopted, as modified, Initial Decision in rulemaking proceeding which determined that a common carrier failed to meet its burden of proof that it is necessary or desirable in the public interest pursuant to Section 201(a) of the Act, 47 U.S.C. § 201(a) to order the

establishment of through rates and a division of charges. Exceptions are granted in part and otherwise are denied.
—*Offshore Telephone Co.*
Docket No. 21396

Common Carrier, Toll Sharing
(See: Common Carrier, Rates, Charges, See Also Tariffs-*Offshore Telephone Co.*)

Comparative Coverage Issue
In hearing matter of mutually exclusive CP applications for television station, Review Board reversed ALJ's grant and awarded it to competing applicant. Two applicants who merged into one applicant entity after hearing were not allowed to improve their comparative qualifications. Winning applicant awarded comparative preferences under diversification and coverage criteria.
—*Daytona B/cing Co., Inc.*
BC Docket No. 81-262

Comparative Hearing
Review Board affirmed *I.D.* grant to applicant proposing to move its FM station to new channel, divest its AM station in community, and integrate into management 96.4% of its ownership which is qualitatively enhanced by long-term local residence, civic participation, and extensive broadcast experience. Two closest applicants proposed 100% integration but were less enhanced.
—*Vacationland B/cing Co., Inc. (WFTW-FM)*
BC Docket No. 81-855

Compensation of Expenses to Mitigate Cuban AM Interference
Part 1, Subpart M, of the FCC Rules and Regulations adopted prescribing requirements and procedures for obtaining compensation for allowable expenses incurred by AM radio station licensees to mitigate interference from Cuba, pursuant to Section 7 of the Radio Broadcasting to Cuba Act.
—*Cuban Interference*
MM Docket No. 84-1

Competition
Memorandum Opinion and Order adopted denying Application for Review of Common Carrier Bureau Order which held that 900 MHz local frequency licensees may provide wide-area or network paging

so long as they provide local paging service on these non-network frequencies.
—*Metromedia Telecommunications, Inc.*

Comsat, as Common Carrier

Second Memorandum Opinion and Order adopted concerning Comsat's corporate structure and cost allocation practices. Order finds Comsat's current organizational structure to be acceptable but orders modifications to Comsat's cost allocation practices.
—*COMSAT*
CC Docket No. 80-634

Report and Order adopted terminating Inquiry on proposals to permit the U.S. International Service Carriers (USISCs) to obtain "direct access" to INTELSAT space segment facilities. Order retains current policy which provides that the U.S. Signatory to INTELSAT - the Communications Satellite Corporation (Comsat) - has exclusive U.S. ownership interests in the INTELSAT satellite system, and requires the USISCs to lease INTELSAT space segment facilities from Comsat pursuant to tariff.
—*INTELSAT Satellite Facilities*
CC Docket No. 82-548

Notice of Proposed Rulemaking adopted re modification of policy on ownership and operation of U.S. earth stations that operate with the INTELSAT global communications satellite system.
—*U.S. Earth Stations*
CC Docket No. 82-540

Comsat, Carrier Participation
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Comsat, Charges and Rate Classifications
(See: Comsat, as Common Carrier-*COMSAT*)

Comsat, Earth Station Complex
(See: Comsat, as Common Carrier-*U.S. Earth Stations*)

Comsat, Facilities Authorization
(See: Common Carrier, International-*COMSAT*)

Consent of Origination Station, See Also Rebroadcasts

Commission returned applications as unacceptable for filing. Requisite elements constituting express written retransmission consent of originating station under Section 325(a) of the Act and Section I,

Question 4(b) of FCC Form 346 include applicant, community and output channel, as specified in the application. Proposal to rebroadcast designated primary station must be technically feasible under Section 74.1231(b) of the Rules.
—*E. Kaye Johnson*

Cuban Interference, Compensation for Mitigation of
(See: Compensation of Expenses to Mitigate Cuban AM Interference-*Cuban Interference*)

Petition for reconsideration granted. Amendment of Sections 1.1708 and 1.1709 of Part 1, Subpart M of the FCC Rules and Regulations adopted relating to compensation allowable for equipment costs incurred to mitigate interference from Cuba, pursuant to Section 7 of the Radio Broadcasting to Cuba Act.
—*Cuban Interference*
MM Docket No. 84-1

Depreciation Rates
Commission prescribed depreciation rates for the first time for AT&T's newly established regional interexchange corporations. With minor exceptions the prescribed rates are equal to those which were prescribed previously for the BOCs.
—*AT&T Communications*

Developmental Authorization
Application for review of grant of developmental authority to MCI Cellular Telephone Company to conduct field strength tests in Pittsburgh denied. Argument rejected that competitors were denied due process when Common Carrier Bureau failed to place application on public notice. Applications for field strength tests are not subject to public notice requirements.
—*MCI Cellular Teleph. Co.*

Discovery
(See: Appeal-*RKO General, Inc. (KHJ-TV)*)

Distress Sale
Commonly-owned renewal applicants' motion for distress sale relief granted. Transfer of applicants' stations for price representing less than 75% of their fair market value approved although the stations' renewal applications had been designated for hearing on basic qualifying issues. Complied with formal requirements relating to

ascertainment of market value and disclosure of circumstances underlying distress sale proposal.
—*Radio Station WTJH*
MM Docket No. 83-47

Distress Sale Policy
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Domestic Public Land Mobile Radio Service, Authorization
(See: Domestic Public Land Mobile Radio Service-*MCI Cellular Teleph. Co.*)

Due Process
(See: Domestice Public Land Mobiel Radio Service-*MCI Cellular Teleph. Co.*)

Educational Noncommercial Broadcast Service
On reconsideration, the Commission amended its policy governing underwriting and donor acknowledgements aired by public broadcasters to permit the use of brand and trade names as well as product or service listings. It also clarified its policy that fundraising that altered or suspended programming was permitted only for the benefit of the station itself.
—*Educational B/cing Stations*
Docket No. 21136

Education Noncommercial FM Station, Limitations
(See: Educational Noncommercial Broadcast Service-*Educational B/cing Stations*)

Education Noncommercial FM Station, Use of
(See: Educational Noncommercial Broadcast Service-*Educational B/cing Stations*)

Educational Noncommercial TV Station, Limitations
(See: Educational Noncommercial Broadcast Service-*Educational B/cing Stations*)

Report and Order terminated proceeding concerning use of subscription television authorization for public television stations with no change in the rules.
—*Public Television STV*
BC Docket No. 82-441

Education Noncommercial TV Station, Use of
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Exception, to Initial Decision
Exceptions to Initial Decision, FCC 81D-63, regarding authority to construct earth station antennas and associated facilities at Hickam Air Force Base, Hawaii, and Finegayan, Guam for provision of 1.544 Mbps service dismissed or denied. Certain portions of the I.D. vacated.
—*COMSAT*
CC Docket No. 81-353

Fairness Doctrine, Contrasting Viewpoint Duty to Encourage
(See: Application, for Review-*Brent Buell, et al.*)

Fairness Doctrine, Licensee Obligations
Application for review of Mass Media Bureau's ruling of July 29, 1983, denied. When determining whether an issue is controversial and of public importance, the mere number of persons involved need not be a major factor where the complainant has not shown that any substantial number of them are vigorously debating the subject issue.
—*United Church of Christ*

Fee Refunds
Petition for reconsideration of Managing Director's fee refund denial denied. Petitioner essentially reargues the points it previously made.
—*Hocking Valley B/cing Corp.*

Financial Qualifications
(See: Comparative Hearing-*Vacationland B/cing Co., Inc. (WFTW-FM)*

FM Station, Authorization
(See: Comparative Hearing-*Vacationland B/cing Co., Inc. (WFTW-FM)*

FM Stations, Classes A, B1, B, C2, C1 and C
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FM Station, Technical Standards
Second Report and Order adopted increasing peak modulation level to 110%. This will allow licensees to maximize their use of FM subchannels.
—*Amendment of Parts 2 and 73*
BC Docket No. 82-536

Foreign Language Broadcasts, See Also Programming, Foreign
Renewal applicant preferred over challenger on basis of licensee's past broadcast record. Challenger gets demerit for carelessness in prosecuting its application. Renewal applicant receives no preference for proposed specialized programming.
—*Broadcast Communications*
BC Docket No. 81-157

Freedom of Information Act, Commercial Financial Info Exemption
Application for Review of staff ruling granting FOIA request for excised documents denied. Customer premises equipment documents allegedly misappropriated from company and transmitted to the Commission acquired agency record status. Exemption 4 inapplicable to most information contained in documents.
—*AT&T Information Systems*

Freedom of Information Act, Review of FCC Staff Action
(See: Freedom of Information Act, Commercial Financial Info Exemption-*AT&T Information Systems*)

Frequency Allocation
Order modified Parts 2 and 97 of the Rules, to remove restrictions on the Amateur Service use of the 1900-2000 kHz band which were imposed due to LORAN-A radiolocation operations.
—*Amendment of Parts 2 and 97*

Frequency Allocation, Amateur
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Frequency Assignment
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INTELSAT
(See: Common Carrier, International-*COMSAT*)

(See also: Common Carrier-*COMSAT*)

(See also: Common Carrier-*International Relay, Inc.*)

(See also: Comsat, as Common Carrier-*Intelsat Satellite Facilities*)

(See: Comsat, as Common Carrier-*U.S. Earth Stations*)

Interference, Cuban, Compensation for Mitigation of
(See: Compensation of Expenses to Mitigate Cuban AM Interference-*Cuban Interference*)

Interference, Cuban, Compensation for Mitigation of
(See: Compensation of Expenses to Mitigate Cuban AM Interference-*Cuban Interference*)

(See also: Cuban Interference, Compensation for, Mitigation of-*Cuban Interference*)

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(See: Comsat, as Common Carrier-*COMSAT*)

(See also: Comsat, as Common Carrier-*U.S. Earth Stations*)

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(See: FM Station, Technical Standards-*Amendment of Parts 2 and 73*)

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(See also: Comparative Hearing-*Vacationland B/cing Co., Inc. (WFTV-FM)*

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(See: Fee Refunds-*Hocking Valley B/cing Corp.*)

(See also: Common Carrier, Operating Expenses-*AT&T Co.*)

Regarding
(See: Fairness Doctrine, Licensee Obligations-*United Church of Christ*)

Remand From Court of Appeals
Absent a direction by the Court of Appeals to do otherwise, Section 402(h) of the Communications Act of 1934, as amended, requires the Commission to proceed on remand. Petitioners' unsolicited and unauthorized pleading, which attempts to comment and argue matters based not only on the existing records, but also new facts and arguments not previously raised, was properly rejected by the Commission.
—*First Charleston Corp. (WCIV-TV)*

Renewal, Applicant v. New Applicant
(See: Foreign Language Broadcasts, See Also Programming, Foreign-*Broadcast Communications*)

Reopening of Record
(See: Remand From Court of Appeals-*First Charleston Corp. (WCIV-TV)*

Right to File Pleading
(See: Remand From Court of Appeals-*First Charleston Corp. (WCIV-TV)*

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(See: Exception, to Initial Decision-*COMSAT*)

Rulemaking, Notice of Proposed
Commission tentatively concluded in Notice of Proposed Rulemaking that regulation of satellite procurements may be replaced by market forces and proposed elimination or amendment of its satellite procurement rules.
—*Amendment of Part 25*
CC Docket No. 84-360

Rule Making, Proceeding
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Rules, Amendment
(See: FM Station, Technical Standards-*Amendment of Parts 2 and 73*)

Satellite Communications, International, Policy re
(See: Common Carrier-*COMSAT*)
(See also: Comsat, as Common Carrier-*Intelsat Satellite Facilities*)
(See also: Common Carrier-*International Relay, Inc.*)

Satellite Communications, Overseas
(See: Common Carrier, International-*COMSAT*)

Satellite Communications, Procurement
(See: Rulemaking, Notice of Proposed-*Amendment of Part 25*)

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Station Separation
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Subscription TV
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Suburban Community 307(b) Issue
(See: Character Qualifications-*Alan K. Levin*)

Translator FM
(See: Consent of Origination Station, See Also Rebroadcasts-*E. Kaye Johnson*)

Character Qualifications
Suburban Community 307(b) Issue

In hearing matter of mutually exclusive CP applications for AM station, Review Board affirmed ALJ's grant. Board agreed with the ALJ that a drug issue was not a factor in the proceeding and that none of the proposals is entitled to a dispositive Section 307(b) preference.
—*Alan K. Levin*
BC Docket No. 80-712

FCC 84R-18

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Alan K. Levin Dillon, Colorado	BC Docket No. 80-712 File No. BP-20,581
SUMMIT RADIO, INC. Dillon-Frisco-Silverthorne, Colorado	BC Docket No. 80-713 File No. BP-780728AN
DILLON BROADCASTING COMPANY Dillon, Colorado	BC Docket No. 80-714 File No. BP-780728AO
For Construction Permit	

Appearances

William H. Crispin and *Terrence J. McCartin* on behalf of Alan K. Levin; *Michael L. Glaser, Francis E. Fletcher, Jr.* and *Bradshaw Rost* on behalf of Summit Radio, Inc.; and *Richard A. Helmick* on behalf of Dillon Broadcasting Company.

DECISION

Adopted: March 9, 1984; Released: March 15, 1984

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD: BOARD MEMBER BLUMENTHAL DISSENTING WITH STATEMENT.

1. The three remaining applicants in this comparative case, Alan K. Levin, Summit Radio, and Dillon Broadcasting Company, all propose to establish a new AM radio station in Colorado. Following a trial type hearing, Administrative Law Judge Chachkin selected Dillon Broadcasting as the best comparative applicant. FCC 83D-39, adopted 7-7-83, 96 FCC 2d. The case is now before us on the exceptions filed by Levin and Summit whose briefs identify two principal issues which must be resolved: (a) whether Dillon Broadcasting should be disqualified or assessed a dispositive comparative demerit on an issue concerning alleged drug use by its 100% stockholder, paras. 3-10 below, and (b) whether Summit is entitled to a dispositive 47 U.S.C. 307(b) preference for its tri-city licensing proposal that would make it unnecessary to reach the standard comparative issue, paras. 11-17 below. Oral argument was held on December 22, 1983. For the reasons set out below we affirm the ALJ's grant of Dillon Broadcasting's application.

2. *Background*: As presently constituted, this comparative broadcast proceeding involves the three conflicting applications of Levin, Summit, and Dillon Broadcasting. Levin and Dillon Broadcasting both propose Dillon, Colorado as their community of license whereas Summit seeks tri-city licensing for the communities of Dillon, Frisco, and Silverthorne, Colorado.[1] In an Initial Decision released July 18, 1983 (FCC 83D-39), ALJ Joseph Chachkin resolved all disqualifying issues in favor of the respective applicants against whom issues were directed, determined that there was no significant difference on Section 307(b) grounds: "fair, efficient and equitable distribution of radio service" among applicants for different communities, and selected Dillon Broadcasting as the best comparative applicant under the contingent standard comparative issue. None of the parties excepts to the ALJ's comparative evaluation, and should the two issues specified above be answered in the negative, none of the parties dispute that Dillon Broadcasting would be the winning applicant. Summit also contends that the ALJ erred in failing to add a misrepresentation issue against Levin, but that exception would not be decisionally significant if Dillon Broadcasting prevails.

3. *Illegal Use of Narcotics Issue.* Over the objection of the Mass Media Bureau, the ALJ added an issue against Dillon Broadcasting to determine whether Robin Theobald, the 100% owner of Dillon Broadcast-

[1] By Memorandum Opinion and Order, FCC 84R-10, released February 16, 1984, the Review Board severed the applications of Grand Radio, Inc. and Jefferson Wireless Company from this proceeding. Those applications are not mutually exclusive with the applications in this proceeding, and remain pending before the Board.

ing, engages or has engaged in the illegal use of narcotics and, if so, the effect on Dillon Broadcasting's qualifications to be a Commission licensee. *See* Memorandum Opinion and Order, FCC 81M-2444, released August 7, 1981. Levin's request for the issue was based on allegations that Theobald, while half owner and general manager of station KLGT(FM), Breckenridge, Colorado, from September 1975 until June 1979, possessed and used cocaine at the station and elsewhere. *Id.* Levin, who was assigned the burdens of proceeding and proof on the issue, submitted the testimony of three former station employees, two of whom claimed to have observed Theobald use cocaine at the station on single occasions, (*I.D.*, paras. 37, 40-41), while the third witness stated that she saw him use cocaine at the station on two occasions. *Id*, at para. 27. One of the witnesses further testified that she saw Theobald use cocaine on another occasion at a social event. *Id.*, para. 33.

4. Theobald denied the specific allegations (*id.*, paras. 43-46), acknowledged that he had consumed cocaine only on one occasion – at the home of some friends (*id.*, para. 42), and claimed that he frequently inhaled nasal decongestants on the premises of the station (*id.*, para. 47). Dillon Broadcasting also submitted the testimony of Dr. Aris Sophocles, a physician who had been treating Theobald since 1975 for sinusitus, which, according to Sophocles, was due to a long-term dependency on nasal sprays. *Id.*, para. 51. Dr. Sophocles noted that his diagnosis was based on a history of the ailment given by the patient and not on a physical examination. *Id.* He testified further that occasional cocaine use cannot be detected by a physical examination. A physical examination of Theobald in August 1981 showed no evidence of cocaine use. *Id.* Finally, Dillon Broadcasting submitted evidence from another station employee that she had frequently observed Theobald at the station inhaling from a nose spray bottle which she identified as a benzedrex inhaler. *Id.* para. 52. She added that she never saw him use cocaine. *Id.*

5. The testimony of the witnesses against Theobald was rejected by the ALJ, who noted that all were admittedly disgruntled former employees, biased and hostile towards Theobald (*id*, paras. 120-123), that descriptions given by two of the witnesses at hearing concerning the bullet-like device allegedly used by Theobald to inhale cocaine conflicted with earlier depictions by the witnesses in a pre-hearing affidavit and a deposition, respectively (*id.*, paras. 121-122), and that the similarity in appearance between the benzedrex inhaler and the device allegedly used for inhaling cocaine raised the possibility that the nasal spray may have been mistaken for a vial containing cocaine. *Id.*, para. 124. Accordingly, he resolved the issue in favor of Dillon Broadcasting, and the issue therefore had no impact on Dillon Broadcasting's basic or comparative qualifications. Levin challenges the ALJ's resolution of this factual issue,

contending that a preponderance of the evidence establishes that Theobald used cocaine at station KLGT on several separate occasions. Levin urges that Dillon Broadcasting be disqualified or at least assessed a dispositive comparative demerit for Theobald's misconduct (Levin's Br. at 5).

6. We affirm the ALJ's conclusion that the drug issue is not a factor in this proceeding and reject Levin's request to disqualify or to impose a dispositive demerit against Dillon Broadcasting. Procedurally, the Board agrees with the Bureau's position at the time the issue was sought in 1981 that the issue should not have been specified in this proceeding because:

> The Commission has consistently refused to intervene in matters of alleged violations of local or federal law where the forum entrusted with enforcement of those laws has not been consulted initially. *Alabama Citizens for Responsive Public Television, Inc.*, 44 RR 2d 1363 (ALJ 1978); *CBS, Inc.*, 49 FCC 2d 1214 (Rev. Bd. 1974); *RKO General, Inc.*, 47 FCC 2d 827 (Rev. Bd. 1974); and *Lamar Life Broadcasting Company*, 26 FCC 2d 112 (Rev. Bd. 1970). There is no indication that Levin's allegations have ever been brought to the attention of the authorities entrusted with the interpretation and the enforcement of the laws allegedly violated. Therefore, consistent with the Commission's long standing policy, the issue should be denied." (Bureau Opposition filed June 15, 1981, p.3).

A year later, in *WHW Enterprises, Inc.*, 89 FCC 2d 799, 806-7, 51 RR 2d 409, 414 (Rev. Bd. 1982), *rev. denied*, FCC 83-368, September 15, 1983, a unanimous Review Board agreed with the same Bureau that:

> Traditionally, the Commission has declined to inquire into alleged violations of local or federal law by applicants where the allegations have not been brought to the attention of the appropriate governmental authority or where the authority has not taken action. *Post-Newsweek Stations, Florida*, 57 FCC 2d 1259 (1975); *Bangor Broadcasting Corporation*, 33 FCC 2d 687 (Rev. Bd. 1972); *Lamar Life Broadcasting Company*, 26 FCC 2d 112, 120 (Rev. Bd. 1970). [Broadcast Bureau Br., at 47]

And only a few days ago the Board followed *WHW Enterprises, supra*, and the general rule in *GAF Broadcasting Co.*, FCC 84R-17, 96 2d 411, release 3/5/84, paras. 16-17.

7. Although we have recognized that some cases cannot be reconciled with the general rule of non-intervention or forbearance, *Country Broadcasting Co.*, 93 FCC 2d 83, 84 n.3, 53 RR 2d 293, 294 n.3 (Rev. Bd. 1983), "non-intervention is consistent with the weight of precedent," *GAF Broadcasting Co., supra*, note 11, and more recent Commission decisions. Thus, in *Intercontinental Radio, Inc.*, 88 FCC 2d 819, 823 (1981), the Commission refused to adjudicate alleged violations of the National Labor Relations Act where the allegations had not been submitted to the NLRB; in *Katy Communications, Inc.*, 87 FCC 2d 764 (1981), a consent decree with the SEC over alleged securities and banking violations was not a cause for further FCC inquiry; and in *Kaye-Smith Enterprises*, 90 FCC 2d 27, 39 (1982), the FCC refused in the first instance to investigate

alleged violations of state perjury laws.[2] The general rule also accords with *Community Tel. of Southern Cal.* v. *Gottfried*, 103 S. Ct. 885 (1983), where the Court states that the Commission would be "obligated to consider the possible relevance" if a broadcaster were found "*guilty* of violating the Rehabilitation Act, or indeed of violating any other federal statute. . . .," *Id.*, at 892 (emphasis added). However, the Court also indicated that absent a specific Congressional directive, the Commission may forbear and does not have to exercise "original jurisdiction over the processing of charges" that broadcasters have violated other federal law. *Id.*, 892-93, notes 16, 17.

8. The Commission's general policy is particularly prudent in situations such as the one we have here involving potentially serious criminal misconduct. Contested allegations of drug use are the type of allegations that should be resolved initially in a court of competent jurisdiction with all the precise constitutional and statutory protections applicable in criminal proceedings rather than in the more malleable administrative proceedings. *Cf. Kaye-Smith Enterprises*, 90 FCC 2d 27, 39, 51 RR 2d 839, 848 (1982). See separate statements in *David Hildebrand*, 52 RR 2d 1671 (1983); and *Faith Center, Inc.*, FCC 83R-47, released July 7, 1983. The Commission has indicated that it does not have "the authority, responsibility or resources to investigate and adjudicate allegations of such violations," *see Kaye-Smith, supra*, and it "lack[s] the expertise and the resources to interpret other statutes . . . unrelated to the broadcast licensing function." *FCC Character Inquiry*, 87 FCC 2d 836, 846 (1981).

9. Substantively, assuming *arguendo* that the record contained a finding of "guilty" by a court of competent jurisdiction, or that we credited all of Levin's charges of unlawful drug usage, this would not automatically destroy an applicant's qualifications to be a Commission licensee, as suggested by Levin. Commission policy would still require us to predict or forecast from the past violations whether the applicant can be relied upon to comply with FCC regulatory laws and policies in its broadcast operations. *See, e.g., RKO General, Inc.*, 78 FCC 2d 1, 26, 47 RR 2d 921, 942 (1980); *Central Texas Broadcasting Co.*, FCC 83-415,

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[2] The policy on *Violation by Applicants of Laws of United States*, 42 FCC 2d 399 (1951), relied on by the dissenting statement only indicates that the Commission "may" inquire into unadjudicated violations of federal law. 42 FCC 2d at 403. The Bureau has cited six cases decided during the 1970s in support of the Commission's general practice not to inquire, see para. 6 above. Our research has yielded 30 cases during the 1970s and 1980s following the general practice, and 6 exceptions. Thus, the dissenting statement turns the two exceptional cases which are cited into the general rule. Moreover, *Central Texas Broadcasting Co.*, FCC 83-415, released September 21, 1983, one of the exceptional cases, concerned the manner in which the issue should be resolved after hearing. *See Gross Broadcasting, Inc.*, FCC 83-443, n.2, released November 21, 1983, where the Commission further explained the brief comment in *Central Texas.*

released September 21, 1983. And, in this regard, the Commission and the Courts have held that a broadcaster's past performance is the best indicia of future operations. *Citizen Communications Center* v. *FCC*, 447 F.2d 1201, 1208 (D.C. Cir. 1971); *Radio Station WBAZ, Inc.*, 90 FCC 2d 818 (1982). In the instant case, the record reflects that Theobold in fact operated Station KLGT(FM) for nearly four years. Levin focused no attention at all on past broadcast record, nor did he show that Station KLGT(FM), while under the stewardship of Theobold, was operated in any manner inconsistent with the public interest, the Commission's rules, or policies. Under these circumstances, the few alleged violations of drug laws, even if true, have no predictive value as to prospective compliance with the Commission's rules and policies because they are overbalanced by a four-year history of broadcast operations without any demonstrated violations of the Communications Act, Commission's rules or policies.

10. Of course, this Board shares the common concerns about the danger of drug abuse in our society and in broadcasting. Concern about that danger was articulated more than a decade ago by the Commission. *See Licensee Responsibility to Review Records*, 31 FCC 2d 377 (1971), *aff'd sub nom. Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973); *Trustees of the University of Pennsylvania (WXPN(FM))*, 69 FCC 2d 1394, 1404 (1978). In this case, however, there is no showing that Theobold violated that policy or any other provision of the Communications Act or the Commission's rules in his four-year operation. Contrast the *Trustees* case, *supra*. On the limited factual record before us, both for procedural and substantive reasons, we cannot brand the applicant before us as a drug offender, who is unfit to be a broadcast licensee. To do so, we would need much clearer substantial evidence and a higher degree of certitude to set aside some of the real and reasonable doubts of the ALJ, who had the opportunity to observe the witnesses. Accordingly, we agree with the ALJ that this matter should have no adverse impact on Dillon's broadcast qualifications.

11. *Section 307(b) Issue.* Section 307(b) of the Communications Act of 1934, as amended, requires a "fair, efficient, and equitable distribution of radio service" among applicants for different communities. 47 U.S.C. §307(b). If the radio needs of one community are substantially favored over the needs of the other, the Commission will grant the application proposing to serve the community with a greater need, without first determining which applicant is comparatively better qualified to provide radio service. *See F.C.C.* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 361-362 (1955); *Casey Broadcasting Company, Inc.*, 89 FCC 2d 618, 622, 51 RR 2d 247, 250 (Rev. Bd. 1982); *rev. denied*, FCC 83-61, released February 24, 1983. A Section 307(b) selection, however, is required only if the "record offers 'sufficient differences between the proposals to permit

a meaningful 307(b) choice." *See WHW Enterprises, Inc., supra,* at 812, 51 RR 2d at 418. In the instant case because Summit seeks tri-city licensing for Dillon, Frisco and Silverthorne, Colorado, whereas Dillon Broadcasting and Levin specify Dillon as their proposed community of license, the Commission designated an issue to determine whether the tri-city proposal or one of the Dillon proposals would better effectuate the objectives of Section 307(b). See Memorandum Opinion and Order, 45 Fed. Reg. 85512.

12. Dillon and Silverthorne, whose boundaries are contiguous, and Frisco, located approximately 3½ road miles from Dillon, are small mountain resort communities with populations of 337, 989, 1221, respectively. *I.D.*, paras. 86, 91-93, 137. There are no aural broadcast facilities currently licensed to any of the three communities and each now receives at least five existing aural broadcast services. *Id.*, para. 95. All of the applicants propose to operate daytime only, and their proposed service areas are substantially identical, with Summit serving slightly more people overall: 1440 more than Levin and 1269 more than Dillon Broadcasting. *Id.*, para. 140. Summit would provide a third service to 108 people not served by either of the other applicants, a fourth service to 686 persons not served by Levin and 645 not served by Dillon Broadcasting, and a fifth service to 646 people not served by Levin and 516 not served by Dillon Broadcasting. *Id.*, paras. 95, 140. All three applicants will provide principal city coverage, the highest quality service, over Dillon, Frisco and Silverthorne. *Id.*, para. 95.

13. The ALJ concluded in his I.O. that there was no significant Section 307(b) choice between Summit's proposal to divide its efforts between Dillon, Frisco and Silverthorne and Levin's and Dillon Broadcasting's proposals to serve Dillon on a primary basis and the other two communities on a secondary basis, citing *Casey Broadcasting Company, supra. Id.*, para. 138. While the ALJ recognized that Summit had a slight advantage under the reception aspect of Section 307(b) because it would serve a slightly greater population than the other two applicants, he concluded that such an advantage was not sufficient to justify a Section 307(b) determination in its favor since Summit does not provide a first or second service to any area. *Id.*, para. 140.

14. Summit requests the Board to overturn the ALJ's holding and award it a decisive Section 307(b) preference in this proceeding. It contends that its proposal to serve three communities at the expense of only one radio frequency best accomplishes the objectives of Section 307(b). Summit argues that it will have a continuing obligation to provide a local service to each of the communities whereas the other applicants' primary obligation will only be to Dillon. Moreover, without publicizing and identifying as being a local outlet for Silverthorne or Frisco, which

only its proposal permits, Summit claims that the needs of those communities will inevitably assume secondary importance to the needs of Dillon. Summit further contends that the additional population it will serve enhances its Section 307(b) superiority.

15. We deny Summit's exceptions on this issue because we agree with the ALJ that *Casey Broadcasting Co., Inc., supra*, is controlling in this proceeding. In that case, one applicant proposing to provide a first local service to two communities, St. Marys and Kingsland, Georgia, sought a Section 307(b) preference over a competing applicant which proposed to provide a first service to St. Marys alone. The Board declined to award a Section 307(b) preference noting that it could not "discern a 'decisive' or significant 307(b) choice between one proposal which under the rules will divide its efforts between the larger and smaller community, and the other proposal which will devote its efforts primarily to the larger community, but also has a secondary obligation to serve the needs of the smaller community, as well as the rest of the service area." *Id.*, at 624, 51 RR 2d at 251. In denying review, the Commission agreed with the Board's result, emphasizing, among other things, that both communities were small and rural, would receive city grade coverage from either applicant and that both applicants had proposed to provide programming responsive to the ascertained needs and interests of each community. FCC 83-61, para. 2, released February 24, 1983. It reached this result notwithstanding that the dual city applicant had proposed to locate a studio and to originate a substantial amount of programming in both communities. *Id.*

16. Here, as in *Casey*, the communities are located in close proximity to one another, share common interests, and would receive city grade coverage from each of the applicants. Similarly, all of the applicants have ascertained the problems, needs, and interests of the service area, which includes all three communities, and proposed programming responsive to those needs and interests. I.D., para. 139. Moreover, in this regard, as pointed out by the ALJ, the facility applied for is intended to provide a regional service. *Id.* Thus, the only notable distinction between *Casey* and the instant case is that in *Casey*, both applicants proposed local service to the larger community whereas here Dillon is the smallest of the three communities. We discern no significance in this distinction, however, particularly since Summit will not locate a studio in either of the larger communities (or Dillon) or originate any live programming from them. *Id.*

17. Summit's contention that the other applicants would not continue to serve the needs of Silverthorne and Frisco since their primary obligations are to Dillon is not only conjectural but contrary to the obligations imposed on them as licensees. As a general rule, a station must not only serve the needs of its community of license but also the needs of its entire service area. *Casey, supra.* Here, the communities are

small and in extremely close proximity, and they share common interests, needs and problems, so that the programs of a radio station in any of the communities should be responsive to the needs of the other two communities. Finally, we agree with the ALJ that the small coverage advantage enjoyed by Summit is not sufficient to make a meaningful Section 307(b) choice, Summit has not cited any case nor are we aware of any involving comparable facts which would support its contention that it should be awarded a Section 307(b) preference here. Rather, we agree with the ALJ that far more significant than Summit's overall coverage advantage are the facts that it would not provide a first or second service to any area and the number of people that would receive a third service is very small. *I.D.*, para. 140. Any preference to which Summit is entitled for its coverage advantage should, as was done here, be awarded under the comparative coverage aspect of the standard comparative issue where it can be factored in with the other comparative criteria used to find the superior applicant. In sum, none of the proposals is entitled to a dispositive Section 307(b) preference.

18. *Summation:* No exceptions were filed to the comparative evaluation of the three applicants. Resolution of the two issues raised by the parties leads to the affirmance of the ALJ's selection of Dillon Broadcasting as the superior comparative applicant and a grant of its application will therefore serve the public interest.

19. ACCORDINGLY, IT IS ORDERED, That the application of Dillon Broadcasting Company (File No. 780728AO) for a construction permit for a new AM broadcast station at Dillon, Colorado, IS GRANTED, and the applications of Alan K. Levin (File No. BP-20,581) and Summit Radio, Inc. (File No. BP-780728AN) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO *Chairman, Review Board*

DISSENTING STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

The Board majority herein takes what the novelist John Le Carre' might descriptively term a "duck-dive."[1] Faced with reliable and substantial evidence that one of the applicants in this contest used cocaine and offered it to broadcast employees,[2] on several different occasions at least,[3]

[1] *See* THE HONOURABLE SCHOOLBOY, at 23 (Bantam ed. 1978).

[2] The term "substantial evidence" is used in its full legal sense, *see* 5 U.S.C. §556(d). Not only did three separate eyewitnesses affirm the offenses, *Decision, ante* para. 3, prior possession and use were conceded by the applicant. *Id*, para. 4. Although the applicant claimed that these particular witnesses saw him inhaling only "nasal decongestants," *id.*, the witnesses each positively identified the substance as cocaine, and counsel for a

including at a station in which he was an equal partner (50%) and the general manager, the Board decides to "take a powder" itself by conveniently observing that the Commission is without original jurisdiction over the alleged drug use. *Decision, ante* paras. 6-8. Further, invoking the Commission's outstanding *Character Inquiry*,[4] it decides in any event that this particular offense is "unrelated to the broadcast licensing function." *Decision, ante* at para. 8. (*quoting* 87 FCC 2d at 846). Because – until that policy is changed – the prevailing Commission policy is embodied in *Violations by Applicants of Laws of the United States*, 42 FCC 2d 399 (1951) ("*Uniform Policy*"), the Board's abjuration is wrong as a matter of law; and, given the nature of the instant offense, it is wrong as a matter of fact in suggesting that illegal drug use by a licensee is unrelated to broadcasting or the licensing thereof.

Under the *Uniform Policy* the Commission announced that it will examine violations of laws other than the Communications Act (and derivative rules) in order to determine whether an applicant should be entrusted with a license to broadcast to thousands, perhaps millions, of citizens. *See* 42 FCC 2d at 402. The *Uniform Policy* specifies that the Commission will not only examine convictions or judgments of other tribunals, but may *independently* examine reliable allegations of serious law violations in the event that no prior adjudication of the allegations has occurred. *Id.*, at 403. Pursuant thereto, the Commission has added issues in recent cases to *independently* adjudicate allegations of law violations running the gamut from anti-trust, *Gilmore Broadcasting, Inc.*, 54 RR 2d 1265 (Rev. Bd. 1983), to state usury and federal energy laws, *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 592 (Rev. Bd. 1982), *review denied*, FCC 83-415, released September 21, 1983, *recon. denied.* Thus, although the Board intimates that the Commission's current policy is to essentially ignore non-communications offenses, the Commission's some-

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competing applicant posited to our Board Chairman the implausibility that the applicant was "sitting in a Porche automobile" offering a female employee a brace of VICKS; the lawyer aptly queried:

> When was the last time someone offered you a decongestant socially? Just ask yourself that question. [Tr. of Oral Argument, at 4131-32]

Later in this statement there is touched upon the question of whether the FCC has the expertise to independently adjudicate non-communications law. It is submitted, however, that no extraordinary "expertise" is necessary to contemplate the foregoing.

[3] Mere possession of cocaine is illegal, 21 U.S.C. §844; and offers to distribute, with or without remuneration, are prohibited. 21 U.S.C. §841.

[4] *Notice of Inquiry on FCC Policy on Character Qualifications*, 87 FCC 2d 836 (1981) ("*Character Inquiry*"). While the majority contends that current policy is one of "non-intervention" into violations of non-communications law, the Commission itself has *expressly* declared just the opposite. *Id.*, at 840 (examination of applicant's compliance with "other law" now "all-inclusive"). Indeed, that is the very impetus for the *Inquiry*.

what chastening comments just a few short months ago in *Central Texas* strongly indicate otherwise; it pointedly declaimed:

> At para. 25 of the Board's Decision, the Board discounts the significance of and imposes no demerit for certain law violations on grounds that they were non-broadcast related, remote, and isolated. As noted in the Designation Order in this proceeding, issues concerning these violations were designated because they raised questions about whether the applicants could be relied upon to comply with regulatory laws and policies. *To the extent that the Board's approach departs from our prior holding without providing an adequate rationale for a determination that misconduct of this nature has no impact on an applicant's qualifications to be a licensee, we expressly withhold affirmation of that aspect of the Board's Decision.*

FCC 83-415, *supra*, at para. 2 (footnote omitted) (emphasis added). Were the Commission's policy on non-communications law violations to be of the "benign neglect" posture depicted here by the Board, we would be compelled to find wholly inane the Commission's *Central Texas* comments issued only last September. Eschewing, naturally, any such impertinent construction, it must be concluded that the Commission continues to desire due scrutiny of other designated law violations.[5]

Without dispute, bedrock and complex questions exist as to whether the Commission has the means, need, or expertise to interpret and adjudicate particular questions of general law, civil and criminal, which might arise in a nation veritably swamped with law and litigation.[6] Moreover, unlike

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[5] In all candor, the Board has noted that in recent years there has been a "superficial" uneveness, at least, in the treatment of allegations of violations of other laws. *See Country Broadcasting Co.*, 93 FCC 2d 83, 84 n. 3 (Rev. Bd.1983) (comparing apparently disparate treatment of "other law" issues and hoping for clarification in the *Character Inquiry*).

In further candor, any such uneveness is quite explicable. *Compare* 47 U.S.C. §308(b) ("Commission by regulation *may* prescribe to . . . character" qualifications) (emphasis added) *with TV 9, Inc.* v. *FCC*, 495 F.2d 929, 938-940 (D.C. Cir. 1973), *en banc rehearing denied*, 495 F.2d 941 (1974) (alleged violation of Organized Crime Act by (1.540%) applicant-principal *must* be examined, even in the absence of a criminal trial).

[6] With all earnest respect, however, the identical question could be posed as to expertise of *any* ordinary federal court, which must adjudicate not only the totality of federal law, but all relevant state law as well (*see generally Erie R. R.* v. *Tompkins*, 304 U.S. 64 (1938)).

Nor can it be argued that in finding by substantial evidence that a broadcasting applicant possessed or distributed an illegal drug that we are, in effect, "convicting an individual of a criminal offense without due process of law." The procedural safeguards attending a criminal prosecution are obviously required when the government would deprive a person of life, liberty or property. No such critical stakes are present in this mere civil licensing action: all we do here is examine an applicant's background to help assess whether he or she possesses the qualifications necessary to control a broadcast station. Nothing more; and that is our *raison d' ētre. 47 U.S.C. §§301-309.*

And, finally, Congress has specifically charged the Commission to civilly adjudicate

certain courts of antiquity, this agency was not ordained by Congress with a universal writ of inquisition over all conduct appearing *contra bonos mores*, nor is an agency's charter rendered boundless by its "public interest" purpose. *See generally N.A.A.C.P.* v. *F.P.C.*, 425 U.S. 663 (1976). Its "public interest" jurisdiction is implicitly circumscribed by its substantive mission. *Id.*, at 669.[7] Certainly, it would have been far preferable had the informants in this case first divulged their allegations to the federal (or state) authorities having basic jurisdiction over drug offenses; and more preferable still had there been a prior adjudication on the alleged offenses. Indeed, the difficult question of whether or when the Commission should refrain from addressing alleged "other law" violations is one of the key components of our outstanding *Character Inquiry*, and I do not mean by this statement to suggest that, in certain past applications of the *Uniform Policy*, our grasp may not have exceeded our reach. Reasonable lines must be better drawn (*see infra* note 14). However, in the interim, this troublesome bundle of credible drug allegations against an instant applicant has been laid on our doorstep and, in contravention of the yet-prevailing *Uniform Policy*, both the Media Bureau and the Board majority are determined to simply shunt it under the mat, and close the door. Under regnant law, we may not do so. *Central Texas, supra*; *Character Inquiry, supra.*

At present, one vital question asked by the Commission in assessing the meaningfulness of other law violations is whether it is "broadcast-related."[8] In its *Uniform Policy*, the Commission singled out the anti-trust laws as an illustration of the serious misconduct it found to be clearly related to broadcasting. *See* 42 FCC 2d at 403-04. If it is consensual that ungentlemanly conduct in the sanguinary arena of competitive commerce is sufficient to cast doubts on an applicant's broadcast qualifications, *see id.*; *see also* 47 U.S.C. §313 (licenses may be stripped for anti-trust violations); *Gilmore Broadcasting, supra*,[9] then it is difficult to

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under the federal Criminal Code, thus belying the notion that the FCC is without the basic competence to adjudicate in this sphere. *See* 47 U.S.C. §312(a), (b) (licenses may be revoked if the Commission civilly determines a violation of 18 U.S.C. §§1304, 1343, or 1464).

[7] On the other hand, the Supreme Court has recently reiterated that although the Commission does not enforce *per se*, other federal laws, "an agency charged with promoting the 'public interest' in a particular substantive area may not simply 'ignore' the policies underlying other federal statutes." *Community Television of Southern California* v. *Gottfried*, 103 S.Ct. 885, 892 n. 14 (1983) (*quoting McLean Trucking Co. v. U.S.*, 321 U.S. 67 (1944)).

[8] *Central Texas, supra*, 98 FCC 2d at 592.

[9] As the noted economist Thomas Sowell of the Hoover Institution observes, one of the *fundamental* purposes of government in a free enterprise society is that:

> . . . government provides a legal framework within which transactors can make their economic (and other) decisions. . . .

say that the Commission should be less concerned with the licensing of a party adequately shown to have several times, at least, violated Federal drug law. Placing a powerful communications instrumentality in the hands of a demonstrated cocaine offender carries with it – in my view – an unacceptable risk of potential irresponsibility. For recent studies document that cocaine use produces marked behavioral changes,[10] ranging from high euphoria, unnatural invigoration, and a sense of unreality at a single use[11] to psychotic conduct tantamount to paranoid schizophrenia for frequent users.[12] Thus, it may be fairly stated that if the violation of *any* laws should be of concern to the Commission in passing upon licensee qualifications, it is *especially* those relating to psychoactive drugs. And, in my view, if Congress intended *any* purpose in the selective licensing of the spectrum it was to assure that television and radio stations did not fall into the hands of just such persons as drug offenders.[13] In an era of deregulation when federal oversight is decreasing and reliance on licensees is increasing, our *initial* scrutiny should be heightened for exactly these reasons.

Acknowledging, again, the obvious uneasiness of having to consider in the first instance allegations of violations such as those at bar, and conceding the slippery questions inherent in prescribing an appropriate FCC role in this entire area relating to violations of other laws, I believe that the majority's abjuration in advance of the consummation of the *Character Inquiry* smacks too much of trying to "get with the program," even before the curtain is raised.[14] And, by adorning a blindfold in its "aim

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MARKETS AND MINORITIES, at 103 (1981).

[10] *See* J.L. Phillips & R.D. Wynne, COCAINE: THE MYSTIQUE AND THE REALITY (1980), which is itself a compendium of world-wide clinical studies on cocaine use.

[11] *Id.*, at 151 ("Psychoactive Effects").

[12] *Id.*, at 161 ("Cocaine Psychosis").

[13] There is no small irony in the fact that three major league baseball players recently lost their "license" to play ball (temporarily at least) for an offense at which the majority blinks in the licensing of a powerful broadcast station. The irony is made glaring when we consider that other agencies of the federal government are actively conducting a massive and expensive "war" on cocaine, a serious national problem. *See, e.g.*, Harris, "*The Drug Game: Undercover in Miami*," *The Washington Post*, March 11, 1984, at K1, col. 1. Thus, the majority's *arguendo* assertion that even if our applicant had been criminally convicted of this recent cocaine possession or distribution it would not necessarily undermine his qualifications is deeply disturbing. *See Decision, ante* para. 9.

[14] Nothing said here is meant to imply a policy requiring the FCC to investigate allegations of transgressions of *all* "other law," regardless of any obvious lack of relevance to FCC licenseeship. Neither is it suggested that we duplicate an investigation or proceeding already concluded or being conducted by another authority. Even the *Uniform Policy* requires nothing so pandemic, nor certainly need any modified policy. For instance, a modified general standard might decline to independently investigate allegations unless the law(s) involved is (are) "inextricably related" to station operation or "substantially parallel" a stated FCC rule or policy. Such a standard would tightly circumscribe our

to please," I fear that the majority has predictably shot itself in the . . . ah, *Decision*.

area of adjudicative concern and yet protect the public from the licensing of a patently unqualified party merely because another available forum has not – for one reason or another – been activated.

Rulemaking, Notice of Proposed
Satellite Communications, Procurement

Commission tentatively concluded in Notice of Proposed Rulemaking that regulation of satellite procurements may be replaced by market forces and proposed elimination or amendment of its satellite procurement rules.

—*Amendment of Part 25*
CC Docket No. 84-360

FCC 84-127

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 25 of the Commission's Rules and Regulations with respect to the procurement of apparatus, equipment, and services required for the establishment and operation of the global communications satellite system and satellite terminal stations.	CC Docket No. 84-360

NOTICE OF PROPOSED RULEMAKING

Adopted March 30, 1984; Released April 10, 1984

BY THE COMMISSION:

1. We have today adopted a Notice of Proposed Rulemaking proposing modification of policy on the ownership and operation of U.S. earth stations that operate with the INTELSAT global communications satellite system.[1] In that NPRM, we have tentatively concluded that the public interest would be served by an earth station ownership policy which permits individual carrier ownership and operation of such stations and relies on competition to the maximum extent permissible by statute. In view of this tentative conclusion we believe that we should concurrently revisit the applicability of and the need to retain the satellite procurement

[1] U.S. Earth Stations (Notice of Inquiry), 90 FCC 2d 1458 (1982); (Notice of Proposed Rulemaking) Mimeo No. (released 1984).

rules set forth in Part 25 of the Commission's Rules and Regulations. 47 C.F.R. 25.151 *et seq.*

2. The Commission's satellite procurement rules were adopted on January 8, 1964 in Docket No. 15123.[2] In that proceeding, the Commission established the rules pertaining to procurement by the Communications Satellite Corporation (Comsat) and other carriers of apparatus, equipment and services required for establishment and operation of the global satellite system and U.S. earth stations operating with that system. The rules were adopted to govern the administration of Sections 102(c) and 201(c)(1) of the Communications Satellite Act of 1962, which delegates to the Commission responsibility for insuring effective competition in such procurement. 47 U.S.C. 701(c) and 721(c)(1).

3. The Commission's satellite procurement rules were established at a time when the primary concern was the expeditious establishment of the global satellite system called for by the Satellite Act. Comsat was created as the entity charged with achieving this goal and, as a result, was to become a large consumer of communications satellite equipment. The Commission then found it necessary to establish uniform comprehensive procedures applicable to all procurements.[3]

4. Those satellite procurement rules are still in effect. They provide for a notification procedure under which the carrier making the procurement must notify the Commission upon selecting a prime contractor. 47 C.F.R. 25.162. The carrier may award the proposed contract at any time subsequent to 10 days after the date of filing notification unless within such period either: (a) it voluntarily extends the period; (b) the Commission notifies it that the notice is defective; or (c) the Commission finds that it cannot, without further investigation, determine whether its procurement rules have been complied with. In the latter case, the Commission may issue a public notice inviting comments on the proposed award. 47 C.F.R. 25.166. The contract may be awarded unless within thirty days after issuance of the public notice the Commission finds that the procurement rules have not been complied with and so notifies the carrier. 47 C.F.R. 25.166(b). Such further notice shall specify a reasonable time within which such party may respond thereto. Upon receipt and consideration of such response, if any, and all other relevant information, the Commission shall enter an order either permitting the award of the contract or subcontract or institute such further proceedings as appear appropriate.

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[2] *Amendment of Part 25 of the Commission's Rules and Regulations (Communications Satellite Procurement)*, 1 RR 2d 1611 (1964).

[3] Section 25.151 exempts procurements (a) less than $100,000, (b) for electric power, gas, water and other utility services, (c) from or through a government instrumentality, (d) for personal services, and (e) made by or on behalf of INTELSAT.

5. The rules also provide for contractor selection to be done by either formal advertising, two-step procurement, or negotiation, and set forth specific procedures for each type of process. The process employed depends on the nature of the apparatus, equipment or service to be procured. *See* 47 C.F.R. 25-171-74. In addition, the rules contain requirements intended to insure that small business concerns have an opportunity to share in the procurements. 47 C.F.R. 25.176.[4] The rules require all affected carriers to maintain records of all awards for three years and annually file reports providing certain information about all subcontractors awarded under prime contracts. 47 C.F.R. 25.177. Also, the rules provide for Commission inspection of the procurement practices and procedures of a carrier, including access to pertinent operations, accounts, records and memoranda. 47 C.F.R. 25.178.

Discussion

6. It has been twenty years since the Commission promulgated its satellite procurement rules. In mandating "maximum competition . . . in the provision of equipment and services utilized by the system," Congress recognized that establishment of a single commercial system would present problems requiring regulation because most major carriers which sought participation in the system were also engaged in the manufacture of satellite hardware and related facilities through corporate affiliates. The fear was that such affiliates might receive favored treatment in supplying equipment and services for the system and thereby deprive others of an opportunity to compete in a then newly emerging market.[5] The Commission enacted its satellite procurement rules to achieve the policy objective of effective competition in procurement of equipment and services and to prevent unfair competitive advantages from accruing to any manufacturing interest.

7. The objective of establishing a global communications satellite system has been achieved through the INTELSAT system.[6] The system has since grown in size and complexity and many countries also have created domestic and regional systems. Continued growth of satellite systems has resulted in a significant demand for earth station equipment, much of which is now available "off-the-shelf," and a satellite equipment industry that is highly competitive. In recently amending the procurement rules to raise the minimum cut-off amount in Section 25.151 from $25,000 to $100,000, we recognized that many buyers and sellers for earth station

[4] In part, this provision requires a carrier to divide procurement into small lots when economically and technically feasible to permit bidding by small business concerns and to award a procurement to a small business concern when a procurement can be fulfilled or furnished by such concern, price and other factors considered.

[5] Communications Satellite Procurement, *supra*, 1 R.R. 2d at 1612-13.

[6] See Comsat Study, 77 FCC 2d 564 (1980).

equipment now exist and will continue to exist in the future.[7]

8. We believe that competition in the satellite equipment market will be further increased by the introduction of competition into earth station ownership and operation as we are today proposing in Docket No. 82-540. Competing earth station owners and operators will have the incentive to seek the least cost, most efficient equipment and services in order to remain competitive. Congress' original concern about the potential effect of establishment of a single commercial system on competition in the procurement of equipment and services should be alleviated as a result. In addition, we are concerned that applying the satellite procurement rules to small earth station operators, such as those seeking to provide INTELSAT's new IBS service or specialized television services, would hinder promotion of competition in such services.[8] The administrative requirements of the rules would appear to be unnecessarily burdensome and costly and may even discourage entry by some potential carriers. Under these circumstances, and in view of our proposals in Docket No. 82-540 to introduce competition in earth station ownership and operation, we tentatively conclude that the Commission's mandate "to insure effective competition" in the procurement of earth station equipment and services can be accomplished through reliance on marketplace forces.[9]

9. However, we remain cognizant of Congress' concern about carrier participants in the system who also have manufacturing and service affiliates. Comsat since 1964 has emerged as a force in satellite communications and technology. Comsat is applying its expertise in many fields of endeavor including the manufacture of specialized satellite communications equipment. The Commission has stated its view that Comsat should not be limited to its *INTELSAT/INMARSAT* role, if its non-*INTELSAT/INMARSAT* activities are not inconsistent with its statutory responsibilities.[10] AT&T no longer has an ownership interest in Comsat. However,

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[7] Amendment of Satellite Procurement Rules, NPRM, Mimeo No. 33039 (released April 18, 1983); Report and Order adopted, Mimeo No. 33814 (released September 23, 1983).

[8] INTELSAT's International Business Service (IBS) is a totally digital integrated service designed to accommodate a full range of user applications including telex, voice, facsimile, data and teleconferencing. We are today granting Comsat's application (IPC-83-004) to participate in the IBS program and we are conditionally granting its applications (CSG-83-039; IPC-83-067) to construct and operate an earth station at the New York Teleport facility to provide IBS service. We are also today conditionally granting the applications of International Relay, Inc., to construct and operate earth stations in Chicago (CSG-84-001-P/L; ITC-84-001) and New York City (CSG-84-004-P/L; ITC-84-024) to provide IBS service.

[9] The INTELSAT procurement regulations apply to INTELSAT procurement of space segment equipment and services. As noted in footnote 3, *supra*, the Commission's procurement rules do not apply to procurements made by or on behalf of INTELSAT.

[10] Comsat Study, *supra*, at 1171-1172; Comsat Structure Proceeding, 90 FCC 2d 1159 (1982), *reconsideration denied*, Mimeo No. 32898 (released April 20, 1983).

with AT&T's established position in both the domestic and international markets and its research and manufacturing capability, it remains a significant force in satellite communications and technology. Therefore, we request information and comments as to whether the existing rules should be amended to apply solely to either or both Comsat and AT&T.

10. In addition, should we decide to continue to make the satellite procurement rules applicable to Comsat and/or to make them applicable to AT&T, we request comments on the extent of regulation necessary to assure effective competition as required by our congressional mandate. Such comments should specifically address the continued need for the retention of (1) the notification procedures Sections 25.162-25.166; (2) the methods of procurement Sections 25.171-25.174; and (3) Section 25.176 concerning small businesses. Comments should also be directed at alternative regulatory approaches to our current comprehensive rules. For example, one alternative approach would be to require either Comsat and/or AT&T to develop internal competitive bidding procedures to replace the current Commission prescribed procedures. Such internal procedures would be initially submitted to the Commission for approval. The Commission would be given a 90 day notice of any subsequent changes in the procedures and could reject those changes. Notice of procurement awards with a copy of the contract would have to be filed with the Commission after award of the contract. Complaints to the Commission would be filed under Section 208 of the Communications Act of 1934, as amended, 47 U.S.C. 208. Complaints must contain allegations, which if true, would constitute a violation of the approved internal procurement rules. As the Commission emphasized in adopting the current satellite procurement rules, we will not perform the role of a contracting officer empowered to initiate, formulate and approve procurement RFP's or contracts, nor will we conduct negotiations or select contractors. Prior Commission approval of contracts is not required.[11] As do the present satellite procurement rules, the approved internal procedures would serve as the procedural framework to assure effective competition in satellite procurements.

11. Accordingly, we request comments on:

(a) the elimination of Sections 25.151 through Section 25.178 or,

(b) the amendment of Sections 25.151 through 25.178 to make them applicable to only Comsat and/or AT&T.

12. *Regulatory Flexibility Act Initial Analysis*

[11] Communications Satellite Procurement, at 1612-13.

I. Reason for Action: It has been twenty years since the Commission adopted its satellite procurement rules currently encompassed under Part 25 of the Commission's Rules, and this passage of time has resulted in changed circumstances necessitating our review.

II. The Objective: The Commission proposes to eliminate its satellite procurement rules *in toto*, and exempt all carriers except, if necessary, Comsat and AT&T.

III. Legal Basis: Authority for the proposed legal action is found at Sections 102(c) and 201(c)(1) of the Communications Satellite Act of 1962, which require the Commission to insure effective competition in satellite procurements.

IV. Description, potential impact and number of small entities affected: The elimination or amendment of the current satellite procurement rules, as proposed, would negate any requirement for small entities to file any documentation under these rules such as small earth station owners.

V. Recording, record keeping and other requirements: The proposed rules would eliminate all requirements for filing pursuant to the satellite procurement rules except, if necessary, Comsat and AT&T.

VI. Federal rules which overlap, duplicate, or conflict with this rule: None.

VII. Any significant alternatives minimizing impact on small entities and consistent with the stated objective: The Commission's alternative is to subject small entities, such as small earth station owners, to the current comprehensive regulation. For the reasons discussed herein, we tentatively conclude that marketplace forces can be substituted, in most instances, for continued regulation in this area.

Procedure Schedule

13. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft order proposing a substantive disposition of such proceeding is placed on the Commission's Sunshine Agenda. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleadings and oral arguments) between a person outside the Commission and a Commissioner or a member of the

Commission's staff that addresses the merits of the proceedings. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation. On the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's Rules, 47 C.F.R. Section 1.1231.

14. Accordingly, IT IS ORDERED, that, pursuant to Sections 4(i), 4(j), 201-205, 214, 215, 218, 220, 303, 309, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), 154(j) 201-205, 214, 218, 220, 303, 309, 403 (1976), Sections 102(c), 201(c), and 401 of the Communications Satellite Act of 1962, as amended, 47 U.S.C. Sections 701(c), 721(c) 741 (1976), and Section 553(b) of the Administrative Procedure Act, 5 U.S.C. Section 553(b) (1970), a Notice of Proposed Rulemaking on the captioned matter is instituted.

15. IT IS FURTHER ORDERED, That, interested parties may file comments on matters raised herein on or before June 15, 1984 and reply comments on or before July 9, 1984.

16. IT IS FURTHER ORDERED, That, in accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, all participants in the proceeding ordered herein shall file with the Commission an original and five (5) copies of all comments and reply comments. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order. Copies of comments and reply comments filed in this proceeding shall be available for public inspection during regular business hours in the Commission's reference room at its headquarters at 1919 M Street, N.W., Washington, D.C.

17. IT IS FURTHER ORDERED, that the Secretary shall cause a copy of this NPRM to be published in the Federal Register and shall mail

a copy of this NPRM to the Chief for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

FM Station, Technical Standards
Modulation
Rules, Amendment

Second Report and Order adopted increasing peak modulation level to 110%. This will allow licensees to maximize their use of FM subchannels.
—*Amendment of Parts 2 and 73*
BC Docket No. 82-536

FCC 84-113

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorizations	BC Docket No. 82-536

SECOND REPORT AND ORDER

Adopted: March 29, 1984; Released: April 9, 1984

BY THE COMMISSION:

Introduction

1. On April 7, 1983, the Commission adopted a *First Report and Order*, in BC Docket No. 82-536, amending parts 2 and 73 of the Commission's Rules concerning use of the subsidiary communications authorization (SCA).[1] The rule changes removed restrictions that limited the use of FM subchannels. Specifically, the rule changes permit the use of FM subcarriers for transmitting non-programming material in addition to programming material; operating subcarriers on a 24-hour basis regardless of whether the main channel is on-the-air; increasing the upper limit restricting the instantaneous sidebands of subcarriers in the FM baseband to 99 kHz; removing the requirement that only frequency modulated subcarriers be transmitted; eliminating the program log requirements for subcarriers; and eliminating the requirement for a formal subcarrier application (Form 318).

[1] 48 Fed. Reg. 28445, June 22, (1983).

2. Further, the *First Report and Order* held open the comment period on the issue of increasing the maximum modulation deviation for FM broadcast stations when using subchannels. Specifically, the Commission sought additional information on two specific issues prior to adopting a new modulation limit. The two issues are:

(A) The degree of reception degradation caused by adjacent channel stations using peak modulation exceeding 100%;

(B) Whether short-spaced stations would suffer adjacent channel interference to any greater extent than normally spaced stations.

Four parties filed comments on increased modulation limits during the extended comment period.[2]

Comments

3. Parties providing comments and engineering reports indicate that increased modulation levels of up to 115% are feasible, however, at levels of 115% or greater interference problems begin to occur. After conducting its own studies and reviewing data submitted by others, American Broadcasting Companies (ABC) observes slight adjacent channel problems in some receivers at modulation increases of 115% to 120%. ABC, however, believes that such problems can be minimized, if not eliminated by new receivers that have been properly designed for the assigned FM bandwidth. Bahakel and the joint comments of the National Association of Broadcasters, Westinghouse Broadcasting and Cable, Inc., and National Public Radio conclude from special studies that peak modulation may be increased to 110% with no adverse impact or reception degradation to adjacent channel stations, whether such stations are normally or short-spaced. These joint commenters suggest that a 110% modulation limit is the best approach. The Consumer Electronics Group of the Electronic Industries Association (CEG/EIA) does not object to a 10% increase in the maximum deviation when two subchannels are operating. Although approving an increase in modulation limits, the CEG/EIA cautions the Commission that, over time, the cummulative effect of minor changes in the interference protection given FM broadcast stations could result in a deterioration of FM as a quality broadcast service.

[2] Parties filing comments include: Bahakel Communications, Ltd., American Broadcasting Companies, Inc., Consumer Electronics Group of the Electronic Industries Association, and the joint comments of the National Association of Broadcasters, Westinghouse Broadcasting and Cable, Inc. and National Public Radio.

Conclusion

4. Based on the data submitted by commenting parties, we are amending our rules to permit peak modulation levels up to but not exceeding 110% when transmitting subchannels. By permitting such increases in modulation level, we are confident that multiple subchannels can be operated without degradation to the main channel and without adversely impacting short-spaced stations.[1]

5. Our action today provides further flexibility to FM licensees who may wish to transmit subchannels. By increasing peak modulation levels to 110%, we will reduce fears expressed by FM licensees regarding the impact subchannel operations would have on main channel broadcast program reception if modulation levels were limited to 100%. The data submitted in this proceeding indicate that peak modulation levels of 110% when transmitting subchannels would not result in reception degradation of the main channel signal and that short-spaced stations would not suffer adjacent channel interference to any greater extent than normally spaced stations.

6. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. *Need for and Purpose of the Rules.*

The Commission has concluded that permitting modulation levels to be increased to 110% would enhance the public interest by providing opportunities for extending and diversifying subchannel service and for improving the efficiency of spectrum utilization.

II. *Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.*

A. *Issues raised.*

1. No issues or concerns were raised specifically in response to the initial regulatory flexibility analysis. All parties agreed that increasing peak modulation levels up to and including 110% would not significantly alter the degree of reception degradation caused by adjacent channel stations using such increased modulation levels. Additionally, parties agree that short-spaced stations would not suffer adjacent channel interference to any greater extent than normally spaced stations.

[3] Until negotiations are completed with government of Mexico, FM licensees with 199 miles of Mexico/United States boarder are limited to 75 kHz and peak modulation levels not exceeding 100%

B. *Assessment*

1. The Commission views the absence of specific claims of adverse impact with respect to increasing peak modulation levels to 110% as indicative of their lack of potential for negative effects on small business.

C. *Changes made as a result of such comments.* None.

The Commission's other alternatives were: (1) not to permit maximum modulation levels above 100%; and (2) to permit maximum modulation levels above 110%. The deny an increase in maximum modulations levels above 100% would have decreased the likelihood that FM licensees would choose to operate two full service subchannels. FM licensees would be less willing to operate two full service subchannels for fear of possible negative effect on reception of main channel service. Permitting maximum peak modulations levels to be increased to 115% or 120% may be feasible, however, engineering studies indicate that increases to 115% or greater may produce adjacent channel problems in some receivers. Therefore, the Commission concludes that by increasing the maximum modulation level up to and including 100% we are providing FM licensees greater flexibility in operating subchannels, while insuring against adjacent channel interference.

7. Authority for adoption of the rules contained herein is contained in Sections 2, 4 (i), and 303 of the Communications Act of 1934, as amended.

8. Accordingly, IT IS ORDERED, that Part 73 of the Commission's Rules IS AMENDED as set forth in the Appendix, effective upon adoption pursuant to 5 U.S.C. §553 (d)(1).

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

APPENDIX

Section 73.319 is amended by redesignating subparagraph (d)(4) as (d)(3) and adding new text for paragraph (d)(4) to read as follows:

§73.319 FM multiplex subcarrier technical standards.

* * * * *

(d) * * *

* * * * *

(3) * * *

(4) Total modulation of the carrier wave during transmission of multiplex subcarriers used for subsidiary communications services must comply with the provisions §73.1570(b).

* * * * *

Section 73.322 is amended by revising paragraph (j) to read as follows:

§73.322 FM stereophonic sound transmission standards.

* * * * *

(j) The total modulation of the main carrier by the stereophonic pilot subcarriers and all stereophonic sound subcarriers and subsidiary communications subcarriers, if used, just comply with the maximum modulation limits specified in §73.1570(b)(2).

Section 73.342 is amended by revising paragraph (b)(3) to read as follows:

§73.342 Automatic transmission system facilities.

* * * * *

(b) * * *

* * * * *

(3) The transmitting system must have a device that will detect and adjust the peak level of modulation. If the modulation exceeds more than 10 bursts of peak modulation within a one minute period as measured at the output terminals of transmitter, the program audio input signal to the transmitter modulators must be automatically adjusted downward until these limits are not exceeded. For the purposes of this requirement, a sequence of repetitive instances of modulation exceeding the prescribed limits occurring within a single 5 millisecond interval will be considered to be one burst. The station must comply with the provisions of §73.1570 with respect to the minimum land maximum modulation levels.

* * * * *

Section 73.542 is amended by revising paragraph (b)(3) to read as follows:

§73.542 Automatic transmission system facilities.

* * * * *

(b) * * *

* * * * *

(3) The transmitting system must have a device that will detect and adjust the peak level of modulation. If the modulation exceeds more than 10 bursts of peak modulation within a one minute period as measured at the output terminals of transmitter, the program audio input signal to the transmitter modulators must be automatically adjusted downward until these limits are not exceeded. For the purposes of this requirement, a sequence of repetitive instances of modulation exceeding the prescribed limits occurring within a single 5 millisecond interval will be considered to be one burst. The station must comply with the provisions of §73.1570 with respect to the minimum land maximum modulation levels.

* * * * *

Section 73.1570 is amended by revising paragraph (b)(2) to read as follows:

§73.1570 Modulation levels; AM, FM, and TV aural.

* * * * *

(b) * * *

(1) * * *

(2) *FM Stations.* The total modulation must not exceed 100% on peaks of frequent reoccurance referenced to 75 kHz deviation. However, stations providing subsidiary communications services using subcarriers under the provisions of §73.319 concurrently with the broadcasting of stereophonic or monophonic programs may increase the peak modulation deviation as follows:

(i) The total peak modulation may be increased 0.5% for each 1.0% subcarrier injection modulation.

(ii) In no event may the modulation of the carrier exceed 110% (82.5 kHz peak deviation).

Note: Stations with transmitter sites located within 320 kilometers (199 miles) of the common United States-Mexico border may not exceed 100% modulation on peaks of frequent reoccurance until such time as the Commission issues a notice that the bilateral agreement with Mexico on FM Broadcasting is amended to to permit greater modulation when transmitting multiplex subcarriers.

* * * * *

Frequency Allocation
Frequency Allocation, Amateur
Frequency Allocation, Table of Frequency Allocations

Order modified Parts 2 and 97 of the Rules, to remove restrictions on the Amateur Service use of the 1900-2000 kHz band which were imposed due to LORAN-A radiolocation operations.
—*Amendment of Parts 2 and 97*

FCC 84-103

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In the Matter of

Amendment of Parts 2 and 97 to remove restrictions on Amateur Service use of the 1900-2000 kHz band due to LORAN-A operations.

ORDER

Adopted: March 22, 1984; Released: March 27, 1984

BY THE COMMISSION:

1. In General Docket 80-739, Implementation of the 1979 World Administrative Radio Conference (FCC 83-511, 49FR2357), footnote NG15 to the Table of Frequency Allocations contained in Section 2.106 was modified to provide continued protection from harmful interference to Canadian LORAN-A radiolocation operations in the 1900-2000 kHz band until January 1, 1984. There is no reason to continue protection to the Canadian LORAN-A radiolocation operations, as they were discontinued on December 31, 1983. Therefore, this Order modifies the Table of Frequency Allocations by removing footnote NG15 and by modifying footnote US290, which makes reference to footnote NG15. Further, Part 97, governing the Amateur Radio Service, is also modified to remove restrictions on amateur use which were imposed to protect the LORAN-A operations. The appropriate modifications to Parts 2 and 97 are listed in the Appendix.

2. Because this amendment simply removes obsolete restrictions on spectrum use and is to the benefit of FCC licensees, compliance with the

prior notice and effective date provisions of the Administrative Procedure Act (5 USC §553) is unnecessary.

3. Accordingly, IT IS ORDERED, that effective March 27, 1984, Sections 2.106, 97.61 and 97.185 are amended as set forth in the Appendix. Authority for this action is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

4. For further information about this item contact Fred Thomas, (202) 653-8171.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

APPENDIX

Parts 2 and 97 of Chapter I of Title 47 of the Code of Federal Registrations are amended as follows:

A. Part 2 Frequency Allocations and Radio Treaty Matters; General Rules and Regulations.

1. Section 2.106 is amended by deleting footnote designation NG15 at column 5 for the 1900-2000 kHz band, by deleting the text of footnote NG15 in its entirety from the list of footnotes following the Table of Frequency Allocations and by modifying the text of footnote US290 at the list of footnotes following the Table of Frequency Allocations.

§2.106 Table of Frequency Allocations

UNITED STATES TABLE	
GOVERNMENT	NON-GOVERNMENT
Allocation kHz (4)	Allocation kHz (5)
* * * * *	
1900 - 2000 RADIOLOCATION US290	1900 - 2000 RADIOLOCATION US290
* * * * *	

US290 In the band 1900-2000 kHz amateur stations may continue to operate on a secondary basis to the radiolocation service, pending a decision as to their disposition through a future rule making proceeding in conjunction with the implementation of the standard broadcasting service in the 1625-1705 kHz band.

* * * * *

B. Part 97 Amateur Radio Service

1. Section 97.61 is amended by modifying subsection (a) by changing the first entry in the table to read 1800-2000, by deleting the second entry in the table in its entirety, and by deleting the texts of subparagraphs (b)(1) and (b) (2), while reserving their subparagraph designators.

§97.61 Authorized frequencies and emissions.

(a) * * *

Frequency band	Emissions	Limitations (see paragraph (b))
kHz: 1800 to 2000	A1, A3	.....

* * * * *

(b) Limitations:

(1) [Reserved]

(2) [Reserved]

* * * * *

2. Section 97.185 is amended by modifying subsection 97.185(b) by removing limitation designator one (1) in the table and by modifying subsection 97.185(c) by deleting the text of limitation one (1) in its entirety, while reserving its designator.

§97.185 Frequencies available.

* * * * *

FREQUENCY OR FREQUENCY BANDS

	Limitations
kHz: 1975-2000	

* * * * *

(c) Limitations:

(1) [Reserved]

* * * * *

Common Carrier, Operating Expenses
Mobile Radio Service, Cellular
Reconsideration, Petition for, Denial of
Subsidiary Company

Commission denied petition for reconsideration of approval of AT&T's request to capitalize separate subsidiary to offer cellular communications services. Subsidiary not required to record on its books of account preoperational expenditures borne by former affiliates. —*AT&T Co.*

FCC 84-142

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Request for Approval of Capitalization Plan for ATT Cellular Co.

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted April 11, 1984; Released April 17, 1984

BY THE COMMISSION:

I. Introduction

1. This order denies a petition, filed on May 13, 1983, by Cellular Mobile Systems, Inc. and Cellular Mobile Services, Inc. (collectively CMS), seeking partial reconsideration of the *Cellular Capitalization Decision*, FCC 83-126 (released April 15, 1983). In that decision, we approved with modifications a plan to capitalize ATT Cellular Co. filed by the American Telephone and Telegraph Co. (AT&T). Under the plan, AT&T would form ATT Cellular Co. to offer cellular communications services, pursuant to our determination in the *Cellular Rulemaking*[1] that AT&T and any

[1] Cellular Communications Systems (Cellular Order), 86 FCC 2d 469 (1981), *recon.*, 89 FCC 2d 58 (Reconsideration), *further recon.*, 90 FCC 2d 571 (1982) (Further Reconsideration), *appeal dismissed sub nom.* United States v. FCC, Cir. No. 82-1526 (D.C. Cir., March 3, 1983).

entity affiliated with it should be allowed to offer cellular services only through a separate subsidiary.[2]

2. CMS argues that, in order to deny successors of ATT Cellular Co. the opportunity to engage in predatory pricing and to prevent them from inflicting other anticompetitive harm upon competitors, certain cellular preoperating expenses incurred by Western Electric and some BOCs should be reflected on the books of the successor companies.[3] AT&T filed an opposition to the petition on May 26, 1983, raising both substantive and procedural arguments.[4] CMS filed a reply to AT&T's opposition on June 6, 1983.

II. *Pleadings of the Parties*

3. CMS complains that all of the $192.7 million spent by AT&T and its affiliates on preoperational research, systems engineering and development for cellular systems and services should be recorded on the books of ATT Cellular Co. or the cellular subsidiaries of ATT Cellular Co.'s successors. It argues that if the books of these companies do not reflect preoperational expenses incurred on their behalf, anticompetitive consequences could arise. Unlike other cellular entrants, CMS asserts, these companies could omit start-up costs from their revenue requirements in state regulatory proceedings, creating the potential for anticompetitive pricing of cellular services by allowing them to set rates above book costs but below actual costs. CMS also asserts that the companies would be able to present prospective investors and creditors with a more optimistic financial picture if those expenses were not required to be recorded on their balance sheets. They would thus have lower costs of capital than competitors who do not have preoperational expenses "written off" by parent companies.

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[2] On January 1, 1984, the Bell Operating Companies (BOCs) were divested from AT&T and reorganized under seven regional holding companies. Modification of Final Judgment (MFJ), United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), *affirmed sub nom.* Maryland v. United States, ____ U.S. ____, 103 S. Ct. 1240 (1983). Although the BOCs are no longer affiliates of AT&T, we recently determined that the cellular structural separation requirements should apply to the divested BOCs. Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, FCC 83-552, released December 30, 1983.

[3] On the date of divestiture, the assets of ATT Cellular Co. used in providing cellular service were transferred to the various regional holding companies and ATT Cellular Co. ceased to be a provider of cellular service. The provision of cellular service now takes place entirely under the auspices of the regional holding companies and their operating company affiliates.

[4] AT&T asserts that the CMS petition is procedurally defective because the issues raised should have been raised in response to the cellular capitalization plan. We find that CMS has raised substantive issues which merit resolution at this time.

4. CMS acknowledges that AT&T Information Systems, Inc. (ATTIS) has not been required to book preoperational expenses incurred on its behalf by AT&T affiliates.[5] However, it would justify different accounting requirements for ATT Cellular Co. and its successors on two grounds. First, ATTIS provides enhanced services and CPE on a detariffed, unregulated basis, while the services of ATT Cellular Co. and its successors will be common carrier offerings subject to regulatory oversight of the ratemaking process in which the treatment of preoperational expenses may be considered. Second, unlike ATTIS, after divestiture, the cellular subsidiaries will not be owned by AT&T.

5. AT&T responds to CMS by arguing that the correct accounting procedure is to expense preoperational costs rather than to capitalize them. In any event, AT&T argues, because of the extensive power of state commissions in setting rates for cellular service and the fact that AT&T's tariff filings have disclosed preoperational expenses attributable to the provision of cellular service, the treatment of preoperational expenses may be considered in establishing rates for cellular service. Finally, it argues that the cost of debt to cellular subsidiaries will be based upon the financial market's assessment of their ability to repay that debt, rather than on initial losses which already have been absorbed by AT&T.

6. The CMS reply states that its central concern is not to determine the proper accounting entries for the preoperational expenses but to ensure that those expenses are handled in a way that avoids the opportunity for anticompetitive pricing. It protests that AT&T is using the divestiture of the BOCs and the transfer of assets from ATT Cellular Co. to the regional holding companies as an excuse to clear ATT Cellular Co.'s books of preoperating expenses. Finally, CMS challenges AT&T's claim that cellular preoperational expenses will be disclosed in state ratemaking proceedings. AT&T's claim should not stand, according to CMS, because it assumes that state commissions will allow BOC cellular entities to establish rates which recover preoperational expenses not shown on the companies' books; it ignores problems associated with allocating those costs between the regional holding companies and their cellular affiliates for ratemaking purposes; and, it leaves determination of the issue to the multiplicity of state jurisdictions, rather than having the issue clearly resolved by this Commission.

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[5] American Telephone and Telegraph Co., 90 FCC 2d 404, 427-428 (1982) (Enhanced Services Order), *recon. granted in part and denied in part*, 91 FCC 2d 578 (1982), *further recon. denied*, FCC 83-424 (released September 20, 1983); *accord* American Telephone and Telegraph Co., 91 FCC 2d 578, 593 n.12 (1982) (CPE Capitalization Order), *recon. denied*, FCC 83-424 (released September 20, 1983).

III. *Discussion*

7. We must deny CMS' request that we require preoperational expenses to be recorded on the books of ATT Cellular Co. or its successor companies. In approving AT&T's plans to capitalize ATTIS for the provision of enhanced services and customer premises equipment, we denied requests that preoperational expenses borne by AT&T affiliates on behalf of AT&T's competitive, non-tariffed ventures be recorded on ATTIS' books of account. We determined that, by requiring AT&T to reimburse all ratepayer-provided funds, we could protect basic services ratepayers from subsidizing ATTIS' competitive ventures through higher basic service rates.[6] So long as AT&T reimbursed all ratepayer-provided preoperational expenses benefitting ATTIS' offerings, AT&T could elect either to require reimbursement from ATTIS or to absorb the expenses itself.

8. In the cellular capitalization plan, AT&T reported that it and affiliated entities had spent $192.7 million by June 30, 1982 on cellular preoperational research, systems engineering and development for cellular systems and services. Our decision in the *Cellular Capitalization Decision* to require reimbursement of some of these amounts relied on essentially the same reasoning as was used in considering previous AT&T capitalization plans.[7] Only the $69.8 million expended by certain BOCs was determined to have been charged to ratepayers and ordered to be reimbursed.

9. CMS' petition does not assert that our *Cellular Capitalization Decision* fails to protect basic services ratepayers. CMS' concern, rather, is that because the BOC cellular entrants are not required to reimburse AT&T for preoperational expenses, and we have not required the BOC cellular entrants to book those preoperational expenses, the BOC cellular entrants are receiving an advantage over their prospective cellular competitors. CMS has not demonstrated, however, why BOC cellular entrants should be required to repay AT&T for preoperational expenditures. First, on the date of divestiture, AT&T stood in full compliance with the requirements of the *Cellular Capitalization Decision.* The MFJ required that AT&T divest itself of cellular operations and transfer those operations to the BOCs without compensation.[8] AT&T had reimbursed the BOCs as directed for preoperational expenses, and elected to absorb them rather than assigning them to the cellular entities, even though the cellular services would ultimately be provided by the divested entities. The BOCs as the current parents of the cellular subsidiaries have discretion equal to that of AT&T concerning recording preoperational expenses on

[6] Enhanced Services Order, 90 FCC 2d at 427.

[7] Cellular Capitalization Decision, *supra*, at para. 18.

[8] MFJ, Section I.A.1.

the books of their subsidiaries. Second, because the cellular subsidiaries are not indebted to either AT&T or the BOCs for preoperational expenses, requiring them to record those expenses could amount to the recordation of an artificial debt or loss possibly resulting in higher than necessary rates for cellular services.[9]

10. Finally, CMS implies that the accounting treatment for preoperational expenses benefitting ATT Cellular Co. should be different than for ATTIS because after divestiture ATTIS will still be owned by AT&T and its shareholders, while the BOC cellular subsidiaries will be owned by different shareholders than those of ATT Cellular Co. CMS does not explain, however, how that difference adversely affects basic services ratepayers or cellular competitors. Accordingly, we find that this part of CMS' argument does not justify modification of our decision herein.

IV. *Ordering Clause*

11. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Cellular Mobile Systems, Inc. and Cellular Mobile Services, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

[9] We recognize that state ratemaking authorities are free to evaluate a carrier's revenue requirements in accordance with their own procedures and determine whether any benefit the cellular subsidiaries receive from preoperational expenditures should be included in those requirements.

Depreciation Rates

Commission prescribed depreciation rates for the first time for AT&T's newly established regional interexchange corporations. With minor exceptions the prescribed rates are equal to those which were prescribed previously for the BOCs.
—AT&T Communications

FCC 84-137

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.20554

In The Matter of
The Prescription of Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended, for:

AT&T Communications of New England, Inc.
AT&T Communications of the Northwest, Inc.
AT&T Communications of the Southern States, Inc.
AT&T Communications of the South Central States, Inc.
AT&T Communications of the Southwest, Inc.
AT&T Communications of the Mountain States, Inc.
AT&T Communications of the Pacific Northwest, Inc.
AT&T Communications of California, Inc.
AT&T Communications of Nevada, Inc.
AT&T Communications of Delaware, Inc.
AT&T Communications of New York, Inc.
AT&T Communications of New Jersey, Inc.
AT&T Communications of Pennsylvania, Inc.
AT&T Communications of Washington, D. C., Inc.
AT&T Communications of Maryland, Inc.
AT&T Communications of Virginia, Inc.
AT&T Communications of West Virginia, Inc.
AT&T Communications of Illinois, Inc.
AT&T Communications of Indiana, Inc.
AT&T Communications of Michigan, Inc.
AT&T Communications of Ohio, Inc.
AT&T Communications of Wisconsin, Inc.

ORDER

Adopted: April 9, 1984; Released: April 11, 1984

BY THE COMMISSION:

I. *Introduction*

1. Section 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §220(b), states that the Commission shall, as soon as practicable, prescribe classes of property for which depreciation charges may be included in operating expenses and the percentages of depreciation which shall be charged to each of these classes. It also states that the Commission may, when it deems necessary, modify the classes and percentages so prescribed. By this order we prescribe percentages of depreciation for the first time for all accounts of the twenty-two regional interexchange companies (IXCs) listed in the caption. These corporations are subsidiaries of AT&T that were established on December 31, 1983, in accordance with the plan of reorganization of AT&T approved by the court in *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D. D. C. 1982), *aff'd sub nom. Maryland v. United States*, 103 S. Ct. 1240 (1983).

II. *Background*

2. AT&T's Interstate Division (formerly Long Lines Division) and the twenty-two new IXCs constitute the newly created AT&T Communications (AT&T) organization which began providing domestic and overseas long distance telephone service primarily between local access and transport areas (LATAs) January 1, 1984. The initial plant owned and operated by the IXCs consists of plant transferred to them from each of the divested Bell Operating Companies (BOCs). Most of the property transferred was formerly jointly owned by the BOCs and AT&T Long Lines Division and has now been assigned to the IXCs as required in the court decision.

3. The IXCs are common carriers engaged in the provision of interLATA and interstate communications by the authority of Section 2(a) of the Communications Act of 1934. In a letter to AT&T on August 19, 1983, the Common Carrier Bureau stated that the regional IXCs are subject to formal prescription of depreciation rates as required by Section 220(b) of the Act. The Bureau indicated that, except for a few accounts, it would likely recommend the prescription of initial rates for the IXCs identical to the rates currently prescribed for the respective BOC jurisdictions.

4. On September 29, 1983, AT&T filed for the prescription of depreciation rates for the IXCs to be effective January 1, 1984. Except for one account, AT&T proposed the use of the rates currently prescribed for each BOC jurisdiction. The exceptions are the rates for the COE-Crossbar account for the following companies and jurisdictions. We have also listed the BOCs from which these assets were transferred.

AT&T Communications of:	*Jurisdiction*	*BOC*
New York	New York	New York Telephone
Delaware	Delaware	Diamond State
Pennsylvania	Pennsylvania	Bell of Pennsylvania
New Jersey	New Jersey	New Jersey Bell
the South Central States	Louisiana	South Central Bell
the Southern States	Georgia	Southern Bell
Wisconsin	Wisconsin	Wisconsin Telephone
Illinois	Illinois	Illinois Bell
Michigan	Michigan	Michigan Bell
Indiana	Indiana	Indiana Bell
Ohio	Ohio	Ohio Bell
the Southwest	Texas	Southwestern Bell
the Northwest	Minnesota	Northwestern Bell
California	California	Pacific Bell
the Pacific Northwest	Oregon	Pacific Northwest Bell
the Mountain States	Idaho	Mountain Bell

5. In its filing AT&T contends that for these jurisdictions the expected average dates of retirement for the COE-Crossbar investments that were transferred from the BOCs to the IXCs are not the same as the expected average dates of retirement for all the crossbar offices in service for the BOCs prior to divestiture. AT&T argues that the COE-Crossbar accounts of the IXCs listed in paragraph 4 should have remaining lives and depreciation rates different from those prescribed for the respective BOC jurisdictions.

6. The Bureau staff reviewed the filings of all the IXCs and discussed them with the state commission staffs. The states were generally supportive of the use of the currently prescribed BOC rates for the initial prescription of rates for all accounts of the IXCs. On November 2, 1983, the staff issued a Public Notice soliciting formal comments from the state regulatory commissions and the public.

III. *Discussion*

7. In response to the Public Notice, comments were received from Pacific Telephone and the state regulatory commissions of Arkansas, California, Florida, Georgia, Michigan, Minnesota, New Jersey, and Oregon. Several state commissions object to the use of the remaining-life and equal-life group (ELG) depreciation methods and to the preemption of state authority over depreciation rates by the FCC. These issues have been thoroughly reviewed and resolved in a number of prescription orders

approved by us pursuant to our decision in *Property Depreciation*, Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981). We will focus in this order on those issues that have not been raised previously and on those that affect the twenty-two IXCs specifically, as opposed to depreciation rates generally.[1]

A. *Accounts Other Than COE-Crossbar*

8. AT&T filed for the use of the rates currently prescribed for the BOCs for all accounts except the COE-Crossbar account for the jurisdictions listed in paragraph 4 of this order. All states that submitted comments regarding this issue support the use of the BOC rates for the IXCs until complete studies of the investment of the IXCs can be prepared by the companies. In light of the need to have initial depreciation rates for the IXCs in effect as soon as possible, we agree with these parties that the most logical approach for accounts other than COE-Crossbar is to prescribe rates based on the current BOC rates until complete depreciation studies can be made by the companies and reviewed by the FCC staff.

B. *COE-Crossbar Accounts*

9. AT&T states that for certain jurisdictions it is not reasonable to use the current BOC rates for that portion of the BOC crossbar assets which transferred to the IXCs. It alleges that, for these jurisdictions, the expected average dates of retirement of the transferred property are earlier than the expected average dates of retirement for the entire pre-divestiture BOC property. It argues that, because its average dates of retirement are earlier, its average remaining lives are less than those used in calculating crossbar rates for the BOCs. It maintains, therefore, that for these IXC jurisdictions the COE-Crossbar assets being transferred require higher depreciation rates than those currently prescribed for the BOCs.

10. Minnesota and New Jersey argue that the singling out of the crossbar investment for higher rates is unwarranted in that, after a complete review, other accounts of the IXCs may also be shown to have

[1] For example, the Arkansas and New Jersey commissions object to this Commission's preemption of state authority over depreciation rates. *See Amendment of Part 31*, 92 FCC 2d 864 (1982), *appeal pending sub nom., Virginia State Corporation Commission v. FCC*, Civ. No. 83-1136 (4th Cir. filed February 11, 1983). These commissions indicate that they have not approved the remaining-life or ELG depreciation methods for their jurisdictions. This order is not the proper forum to reargue the preemption issue, and the pendency of an appeal does not affect the enforceability of our decision absent the issuance of a stay order. *See, e.g., Chesapeake and Potomac Telephone Company of Maryland v. Public Service Commission of Maryland*, C.A. No. N83-855 (D. Md. April 7, 1983). The state commissions are required to use the depreciation rates prescribed herein for state ratemaking purposes.

lives different from those presently prescribed for the BOCs. They allege that it is improper to prescribe different rates for the crossbar account while ignoring the other accounts.

11. Inasmuch as we have mandated the use of the remaining-life depreciation method in *Property Depreciation, Docket No. 20188,* and subsequent orders, we believe that, unless the depreciation expense impacts are extreme, the rates for the IXCs must be based as closely as possible on the average remaining life of their own assets, and not upon the average remaining life of the BOC accounts from which these assets were drawn. In order to determine accurate rates for most accounts of the IXCs we must await complete studies of their property, but for the COE-Crossbar accounts each retirement unit has an individual expected date of retirement that was determined in the last BOC study. The staff has thoroughly reviewed AT&T's retirement schedules for the COE-Crossbar equipment of the IXCs and found them to be consistent with the schedules used for this equipment in the last full reviews,[2] and determined that these rates were computed in accordance with our rules and regulations. None of the state commissions, except Idaho, have offered any convincing reasons why we should not prescribe AT&T's proposed COE-Crossbar rates for the IXCs based on the expected retirement schedules used in the most recent depreciation reviews. Therefore, except for Idaho, we adopt the depreciation rates proposed by AT&T for the COE-Crossbar accounts of the jurisdictions listed in paragraph 4.

12. The Idaho Commission expresses concern about the impact on Idaho ratepayers of the nearly 10% increase in jurisdictional depreciation expense that would result from adoption of AT&T'S proposed COE-Crossbar rates for AT&T Communications of the Mountain States in Idaho. After a thorough discussion of this matter, AT&T and the staffs of the Idaho Commission and the FCC agree that a three-year amortization of this account will allow for timely recovery of the investment while softening the short-term impact on total jurisdictional expense. This procedure is consistent with the amortization principles adopted in our recent depreciation order. *See* FCC 83-587, released December 20, 1983. Therefore, we adopt a three year amortization period for the net book cost less the future net salvage estimate of 7% for the IXC's crossbar account in Idaho.

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[2] Much of the COE-Crossbar investment transferred from the BOCs to the IXCs was in offices that were jointly-owned with AT&T-Long Lines Division. The Commission prescribed rates for Long Lines' COE-Crossbar investment in 1983 based on a detailed staff review. The IXC filings used the same retirement dates for these formerly jointly-owned facilities as were used in Long Lines' filing. *See* FCC 83-587 released December 20, 1983. Furthermore, the retirement dates shown for the remainder of the transferred offices are generally the same or farther into the future than those used to determine the current BOC depreciation rates for the COE-Crossbar accounts.

C. *COE-Crossbar Accounts Of The BOCs*

13. In its August 19, 1983, letter predating AT&T's filing for initial IXC rates the FCC staff noted that the current BOC rates were applicable to all assets before divestiture of a portion of these assets to the IXCs. It further stated that, if the rates for the regional IXCs were revised, the BOC rates should theoretically be revised in order that the total depreciation expense would not be appreciably increased. It also predicted that any change in the depreciation expense resulting from a change in depreciation rates for the IXCs would have a minimal impact on total depreciation expenses because only a small portion of the BOCs' investment (*i.e.*, COE-Crossbar equipment used for toll switching) was being transferred. In its view the impact would be so small that BOC rate adjustments would not be necessary until the next regular triennial reviews. Finally, it stated that the revision of all the BOC rates was not practical at this time.

14. After AT&T formally filed for initial depreciation rates, the staff examined the expense impact for each state in which the IXCs proposed a crossbar rate different from that currently used by the BOC. The staff found that the expense impacts were not significant relative to overall interstate depreciation expense. The staff discussed these impacts with each state commission and none requested any decrease in BOC rates to balance the increases proposed for the IXCs. Additionally, any adjustments in BOC rates that prove to be necessary can be routinely made at the next triennial depreciation review or at the next annual update. After considering the views of all parties, the relatively small impact on overall depreciation expense, and the availability of regular depreciation rate updates, we conclude there is no need to revise any BOC rates at this time.

D. *Conclusion*

15. Having considered the proposals of the companies, the responses to the staff's review letter and Public Notice, and the recommendations of the staff, we adopt depreciation rates for each of the companies as specified in the Appendix. We direct the staff, as it deems necessary, to examine the correctness of the investment and depreciation reserve amounts transferred to the IXCs from the BOCs and to perform complete depreciation studies for these new companies on a regular schedule.

IV. Ordering Clause

16. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§4(i) and

220(b), That the percentages of depreciation specified in the Appendix to this order are prescribed effective on January 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

Appendix

Schedule of Annual Percentages of Depreciation for the Regional Interexchange Companies

Effective January 1, 1984

1. *AT&T Communications of New England, Inc.*

Use depreciation rates shown in FCC Order 82-542 (pages A1-13 through A1-17 and A2-13 through A2-17) and in FCC Order 83-591 (pages A-13 through A-17).

2. *AT&T Communications of the Northwest, Inc.*

Use depreciation rates shown in FCC Order 83-587 (pages A-4 through A-8) except for the COE-Crossbar account in Minnesota. For this account use the following rates:

SLVG Rate:	39.0%
Net Salv. Rate:	1.1%

3. *AT&T Communications of the Southern States, Inc.*

Use depreciation rates shown in FCC Order 83-587 (pages A-10 through A-13) except for the COE-Crossbar account in Georgia. For this account use the following rates:

SLVG Rate:	23.6%
Net Salv. Rate:	0.7%

4. *AT&T Communications of the South Central States, Inc.*

Use depreciation rates shown in FCC Orders 82-39 (pages A4-40 through A4-44) 82-353 (pages A-16 through A-20), and 82-576 (pages A-8 through A-12) except for the COE-Crossbar account in Louisiana. For this account use the following rates:

SLVG Rate:	36.9%
Net Salv. Rate:	0.9%

5. *AT&T Communications of the Southwest, Inc.*

Use depreciation rates shown in FCC Order 83-587 (pages A-14 through A-18) except for the COE-Crossbar account in Texas. For this account use the following rates:

SLVG Rate:	20.6%
Net Salv. Rate:	1.7%

6. *AT&T Communications of the Mountain States, Inc.*

Use depreciation rates shown in FCC Orders 82-542 (pages A1-6 through A1-12 and A2-6 through A2-12) and 83-591 (pages A-6 through A-12) except for the COE-Crossbar account in Idaho. For this account amortize the January 1, 1984, net book cost less future net salvage estimate of -7% in equal amounts over a three-year period.

7. *AT&T Communications of the Pacific Northwest, Inc.*

Use depreciation rates shown in FCC Orders 82-542 (pages A1-19 through A1-21 and A2-19 through A2-21) and 83-591 (pages A-19 through A-21) except for COE-SxS and COE-Crossbar in the Oregon and Washington jurisdictions. For COE-SxS and COE-Crossbar in Washington use the depreciation rates shown in FCC Order 83-607 (page 6). For COE-SxS in Oregon use the depreciation rates shown in FCC Order 83-607 (page 5). For the COE-Crossbar account in Oregon use the following rates:

SLVG Rate:	43.5%
Net Salv. Rate:	-0.8%

8. *AT&T Communications of California, Inc.*

Use depreciation rates shown in FCC Orders 82-542 (page A1-22 and A2-22) and 83-591 (page A-22) except for COE-Manual, COE-SxS, and COE-Crossbar. For COE-Manual and COE-SxS use the depreciation rates shown in FCC Order 83-607 (page A-7). For the COE-Crossbar account use the following rates:

SLVG Rate:	41.3%
Net Salv. Rate:	1.7%

9. *AT&T Communications of Nevada, Inc.*

Use depreciation rates shown in FCC Orders 82-542 (pages A1-1 and A2-1) and 83-591 (page A-1) except for COE-SxS, COE-Crossbar (Gabbs), and COE-Crossbar (Other). For these accounts use the depreciation rates shown in FCC Order 83-607 (page A-1).

10. *AT&T Communications of Delaware, Inc.*

Use depreciation rates shown in FCC Orders 82-542 (pages A1-5 and A2-5) and 83-591 (page A-5) except for the COE-Crossbar account. For this account use the following rates:

SLVG Rate:	94.6%
Net Salv. Rate:	8.4%

11. *AT&T Communications of New York, Inc.*

Use depreciation rates shown in FCC Order 83-587 (page A-3) except for the COE-Crossbar account. For this account use the following rates:

SLVG Rate:	17.4%
Net Salv. Rate:	2.6%

12. *AT&T Communications of New Jersey, Inc.*

Use depreciation rates shown in FCC Orders 82-542 (pages A1-18 and A2-18) and 83-591 (page A-18) except for COE-SxS and COE-Crossbar. For COE-SxS use the depreciation rates shown in FCC Order 83-607 (page A-4). For the COE-Crossbar account use the following rates:

SLVG Rate: 21.7%

Net Salv. Rate: 1.4%

13. *AT&T Communications of Pennsylvania, Inc.*

Use depreciation rates shown in FCC Orders 82-542 (pages A1-2 and A2-2) and 83-591 (page A-2) except for the COE-Crossbar account. For this account use the following rates:

SLVG Rate: 52.9%

Net Salv. Rate: 2.5%

14. *AT&T Communications of Washington, D. C., Inc.*

Use depreciation rates shown in FCC Orders 82-39 (page A4-4), 82-353 (page A-1), and 82-576 (page A-2).

15. *AT&T Communications of Maryland, Inc.*

Use depreciation rates shown in FCC Orders 82-39 (page A4-5), 82-353 (page A-2), and 82-576 (page A-3).

16. *AT&T Communications of Virginia, Inc.*

Use depreciation rates shown in FCC Orders 82-39 (page A4-6), 82-353 (page A-3), and 82-576 (page A-4).

17. *AT&T Communications of West Virginia, Inc.*

Use depreciation rates shown in FCC Orders 82-39 (page A4-7), 82-353 (page A-4), and 82-576 (page A-5).

18. *AT&T Communications of Illinois, Inc.*

Use depreciation rates shown in FCC Orders 82-39 (page A4-11), 82-353 (page A-5), and 82-576 (page A-6) except for COE-SxS and COE-Crossbar. For COE-SxS use the depreciation rates shown in FCC Order 83-607 (page A-3). For COE-Crossbar use the following rates:

SLVG Rate: 30.9%

Net Salv. Rate: 2.0%

19. *AT&T Communications of Indiana, Inc.*

Use depreciation rates shown in FCC Orders 82-39 (page A4-12), 82-353 (page A-6), and 82-576 (page A-7) except for the COE-Crossbar account. For this account use the following rates:

SLVG Rate: 26.1%

Net Salv. Rate: 1.0%

20. *AT&T Communications of Michigan, Inc.*

Use depreciation rates shown in FCC Order 83-587 (page A-2) except for the COE-Crossbar account. For this account use the following rates:

SLVG Rate: 39.4%

Net Salv. Rate: 3.1%

21. *AT&T Communications of Ohio, Inc.*

Use depreciation rates shown in FCC Order 83-587 (page A-9) except for the COE-Crossbar account. For this account use the following rates:

SLVG Rate:	43.9%
Net Salv. Rate:	0.8%

22. *AT&T Communications of Wisconsin, Inc.*

Use depreciation rates shown in FCC Order 83-587 (page A-19) except for the COE-Crossbar account. For this account use the following rates:

SLVG Rate:	35.0%
Net Salv. Rate:	1.0%

Order FCC 82-39, *See Depreciation Rates*, 88 FCC 2d 1223 (1982)
Order FCC 82-353, *See Depreciation Rates*, 88 FCC 2d 964 (1982)
Order FCC 82-542, *See Depreciation Rates*, 92 FCC 2d 920 (1982)
Order FCC 82-576, *See Depreciation Rates*, 92 FCC 2d 693 (1982)
Order FCC 83-587, Adopted: 12/14/83; Released: 12/20/83
Order FCC 83-591, Adopted: 12/14/83; Released: 12/20/83
Order FCC 83-607, Adopted: 12/22/83; Released: 12/27/83

Freedom of Information Act, Commercial Financial Info Exemption
Freedom of Information Act, Review of FCC Staff Action

Application for Review of staff ruling granting FOIA request for excised documents denied. Customer premises equipment documents allegedly misappropriated from company and transmitted to the Commission acquired agency record status. Exemption 4 inapplicable to most information contained in documents.
—*AT&T Information Systems*

FCC 84-52

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AT&T Information Systems	FOIA Control Nos. 83-132, 83-135
On Request for Inspection of Records	

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 1984 Released: February 27, 1984

BY THE COMMISSION:

1. The Commission has before it an application for review filed by American Telephone and Telegraph Company (AT&T) on behalf of AT&T Information Systems (AT&T-IS). AT&T seeks review of an October 4, 1983 ruling by the Chief, Common Carrier Bureau, which granted, in part, the Freedom of Information Act (FOIA) request of Ms. Denise Bonn.[1]

2. By letter dated September 7, 1983, supplemented on September 15, 1983, Ms. Bonn sought access to (1) the letter from Victor J. Toth, Esquire, to Mark S. Fowler, FCC Chairman, dated August 23, 1983 (the Toth letter), (2) a copy of the attachments to that letter, and (3) a copy of all Commission documents similar in content to the attachments to the Toth letter. Ms. Bonn's request enclosed a copy of the Toth letter and a copy of one of the attachments to the Toth letter that was received by Ms. Bonn.

[1] Ms. Bonn is an attorney at Wood, Lucksinger and Epstein, the firm representing the North American Telephone Association (NATA).

3. The Toth letter transmitted to the Commission excerpts from an AT&T-IS document containing approximately 500 pages of customer premises equipment (CPE) information about numerous customers in Minnesota, North Dakota, South Dakota and portions of Iowa and Nebraska. Mr. Toth alleged that the customer information had been passed from Northwestern Bell to AT&T-IS, in contravention of the Commission's *Computer II* rules, specifically 47 C.F.R. § 64.702(d)(3).[2] Because Ms. Bonn acknowledged that the documents might contain proprietary customer information, she requested that it be deleted from any released document.

4. On September 20, 1983, AT&T, on behalf of AT&T-IS, filed an opposition to Ms. Bonn's request. AT&T indicated that AT&T-IS considered the documents confidential, and that the records had been misappropriated from AT&T-IS's files. Thus, AT&T argued that because AT&T-IS did not relinquish control of the documents, they could not be considered agency records subject to the FOIA. Assuming that the documents were determined to be agency records, however, AT&T indicated that their release, even with the customers' names and locations excised, would cause substantial harm to AT&T-IS's competitive position. Therefore, AT&T asserted that the documents were exempt from mandatory disclosure under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4).

5. The Bureau identified 75 pages of charts as the documents within the scope of Ms. Bonn's request.[3] The charts list customers' names and locations, the number of station instruments at each location, the customers' servicing vehicles and the type of contract carried by each customer. They also indicate whether AT&T-IS is the customer's CPE provider and if the company "has contacted" a particular customer. Further, the names of certain AT&T-IS account executives head each identified chart.

6. In its October 4, 1983 ruling, the Bureau concluded that the CPE information contained in the documents, with the exception of the customers' names and locations, was subject to the FOIA disclosure provisions. Specifically, the Bureau indicated that the documents had been submitted for the Commission's use in monitoring AT&T's compliance with Section 64.702(d)(3), and that the Commission had instituted an investigation to determine whether AT&T had violated this provision. Accordingly, the Bureau ruled that, because the documents had been

[2] This rule states, *inter alia*, that a communications common carrier that is prohibited by the Commission from furnishing CPE, may have, nonetheless, a controlling interest in, or may be under common control with, a separate corporate entity that furnishes CPE. The carrier, however, may not provide such separate corporate entity "any customer proprietary information unless such information is available to any member of the public on the same terms and conditions." 47 C.F.R. § 64.702(d)(3).

[3] The documents were all attached to the Toth letter.

submitted in connection with the Commission's official business and were being used to that end, they were agency records. Regarding the applicability of Exemption 4, the Bureau remained unpersuaded that release of the CPE information would result in substantial competitive harm to AT&T-IS. It found that because the information covered too many customers within a large geographic area, it was unlikely that a competitor would be able to identify any customers to the detriment of AT&T-IS's competitive position. Thus, the Bureau concluded that, except for the customers' names and locations, the CPE information was not within the scope of Exemption 4 and therefore, should be made available for inspection.

7. The Bureau further addressed Ms. Bonn's contention that AT&T and AT&T-IS had no standing to oppose the FOIA request or seek review of a grant of the request. It reasoned that the circumstances under which the documents were transmitted to the Commission were not contemplated by Section 0.461(h)(1) and therefore, a waiver of the rule might be warranted.[4] Thus, AT&T-IS was directed to seek a waiver if it chose to appeal the Bureau's determination to release the documents.

8. On appeal, AT&T, on behalf of AT&T-IS, reiterates its previous arguments against disclosure of the documents.[5] It adds, however, that the CPE charts relate primarily to Minnesota, rather than the five-state area specified by the Bureau. Thus, AT&T claims that the information is far more valuable to a competitor than the Bureau's initial analysis indicates. AT&T further states that the release of the allegedly misappropriated documents would only encourage this unlawful activity among competitors, as well as the misuse of the FOIA. On the question of standing, AT&T maintains that Section 0.461(h)(1) confers appeal rights to any party who has a direct interest in the documents submitted to the Commission. AT&T argues, therefore, that as a matter of procedural due process, AT&T-IS should be conferred standing and allowed to be heard in opposition.

9. On September 23, 1983, Ms. Bonn filed an opposition to the application for review.[6] In questioning AT&T's standing to appeal the Bureau's decision, Ms. Bonn argues that under the plain meaning of Section 0.461, the submitter is the only party who may seek review. In this

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[4] Section 0.461(h)(1) of the Commission's Rules, 47 C.F.R. § 0.461(h)(1), provides that "review of [the Bureau's] action may be filed only by the person who submitted the records to the Commission."

[5] AT&T's application for review is accompanied by a request for waiver of Section 0.461(h)(1).

[6] We note that Mr. Toth has indicated that he transmitted to Ms. Bonn copies of all the charts in his possession. The customers' names and locations were excised from these documents. Nonetheless, Ms. Bonn remains interested in examining the 75 pages transmitted to the Commission.

connection, she notes that Mr. Toth has never objected to her FOIA request. Ms. Bonn further claims that it would be inappropriate to allow AT&T to appeal the Bureau's ruling. She observes that the FOIA provides no exemption for allegedly misappropriated documents and that AT&T can seek recourse for the alleged misappropriation in another forum. Finally, in relation to AT&T's new contentions about competitive harm, Ms. Bonn maintains that, regardless of whether the CPE information relates primarily to Minnesota, it still pertains to a large geographic area encompassing many customers. Thus, it is highly unlikely that a competitor would be able to identify each customer listed in the excised documents. Accordingly, Ms. Bonn urges the Commission to affirm the Bureau's ruling.

Discussion

10. For the reasons below, we affirm the Bureau's ruling concerning the documents under consideration and, therefore, conclude that, except for the customers' names and locations, the documents should be released.[7] Initially, we find that the Bureau properly determined that the CPE documents are agency records.

11. The FOIA requires disclosure of all agency records not falling within the scope of the FOIA exemptions. 5 U.S.C. § 552(a)(3). While the statute does not define "agency records," judicial precedent does provide guidance. The threshold test for determining whether any document is an agency record is whether the agency has created or obtained the document. *Forsham v. Harris*, 445 U.S. 169, 182-86 (1980). The parties concede that AT&T-IS created these CPE charts. Thus, the question focuses upon whether the Commission has "obtained" the documents. AT&T contends that AT&T-IS never relinquished control of the documents and, therefore, the submitter here cannot confer upon the Commission more rights than those he initially possessed.

12. Decisional precepts indicate that an agency does not "obtain" records until it has possession or control over them. *See Kissinger v. Reporters Committee for Freedom of the Press* (Kissinger), 445 U.S. 136, 151 (1980); *Wolfe v. Department of Health and Human Services* (Wolfe), 711 F.2d 1077, 1079 (D.C. Cir. 1983).[8] Within that context, "possession"

[7] We reject Ms. Bonn's argument that AT&T-IS has no standing to file its application for review. Section 0.461(h)(1) clearly contemplates an opposition to a request for disclosure of financial or commercial information by the entity with the most direct interest in preserving the confidentiality of that information. To reject AT&T-IS's pleading would exalt form over substance. Thus, insofar as the circumstances presented in this case do not fall within the express terms of Section 0.461(h)(1), we hereby waive this rule to allow AT&T-IS to advance its confidentiality claim.

[8] The *Wolfe* decision notes that the *Kissinger* Court did not explain the significance of using the disjunctive "or" rather than the conjunctive "and." *Wolfe* indicates that

entails more than physical location of the records; a nexus must also be present between the agency's business and the records. *See Kissinger, supra* at 157; *Illinois Institute for Continuing Legal Education v. United States Department of Labor*, 545 F. Supp. 1229, 1234 (N.D. Ill. 1982). In connection with the "control" aspect, the agency's use of a record in its possession is an indication that the agency has obtained control over the record. *See Forsham v. Harris*, 445 U.S. 169, 177 n.7 (1980); *Wolfe, supra* at 1081, n.8.[9]

13. Applying these principles to the present situation, we note that the CPE documents were transmitted to the Commission in connection with its oversight of AT&T's compliance with the *Computer II* rules. The documents remain at the Commission for that purpose. Thus, it is clear that the documents are physically located at the Commission and that there is a nexus between this agency's business and the CPE documents. We conclude, therefore, that the records are within the Commission's possession. Moreover, the Commission's further use of these CPE charts indicates that the Commission has acquired control over the documents. As noted by the Bureau, the documents are central to our pending investigation of the allegation that there was an improper transfer of proprietary information. We believe that these circumstances clearly establish the Commission's possession and control of the CPE documents and, therefore, we conclude that the documents are agency records within the purview of the FOIA. AT&T's allegation that the documents were misappropriated from AT&T-IS's files does not alter the result. We believe that once the Commission obtained these records, they ceased to be within AT&T's control. *Cf. Illinois Institute for Continuing Legal Education* v. *United States, supra* (where the court found that a volume of a briefing book left inadvertently in the office of an employee at the Department of Labor was not an agency record but primarily because the agency had made no use of the volume). AT&T's objection to the manner in which the documents were transmitted to the Commission is not

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applicable case law has not clearly established that possession alone is sufficient to afford a document agency record status. *Wolfe*, 711 F.2d at 1079 n.6. In light of this, it is appropriate to examine the circumstances presented here under both elements of the test.

[9] As noted in *Wolfe*, 711 F.2d at 1081 n.7, the control issue has been approached in two different ways. Some cases examine the intent of the creator of the document to retain control, *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980). Other case law looks at the nature and extent of control exercised by the agency to which the FOIA request was directed, *Kissinger, supra.* In this regard, we note that at least one case suggests that the *Goland* approach may not be applicable to records created by private parties, as opposed to a coordinate branch of government. *See RCA Global Communications, Inc. v. FCC*, 524 F. Supp 579 (D.Del. 1981). The court noted that while *Goland* focused on Congress constitutional authority to keep its records secret, private parties have no comparable authority to modify the FOIA disclosure provisions. *Id.* at 582 n.5, 583 n.7.

relevant to our determination that these documents have become agency records.

14. Having found that the CPE documents constitute agency records, we now address AT&T's contention that the documents must be withheld pursuant to Exemption 4 of the FOIA. This exemption protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The parties do not dispute that the CPE documents contain commercial or financial information and that they were submitted by a person as defined by the Administrative Procedure Act. *See* 5 U.S.C. § 551(2). The question, therefore, is whether the CPE documents are confidential or privileged within the meaning of Exemption 4.

15. The "privileged or confidential" test is met if disclosure is likely: 1) to impair the government's ability to obtain information in the future, or 2) to substantially harm the competitive position of the person from whom the information was obtained. *National Parks and Conservation v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). To justify withholding a document under Exemption 4, it is not necessary to show actual competitive harm. Rather, the substantial "competitive harm" test requires a showing that actual competition exists and substantial competitive injury would likely result from disclosure. *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976).

16. Applying these principles, the Bureau concluded that release of the documents without the customers' names and locations would not result in substantial competitive harm to AT&T-IS. As mentioned, the Bureau reasoned that, because the information related to a wide, five-state area, the identification of particular customers was not feasible. Moreover, the Bureau concluded that, because the information to be released did not suggest AT&T-IS's rationale for contacting some customers and not others, the company's marketing strategy would not be revealed. AT&T now states, however, that the CPE charts relate primarily to Minnesota and specify only AT&T customers in that area.[10]

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[10] In this connection, Ms. Bonn notes that AT&T's application for review reveals information that would not have been gleaned from the excised documents. She argues that, in considering whether to withhold the excised documents, the Commission should not give weight to AT&T's "self-serving public disclosure" of the scope of the CPE information. We reject this contention. In order to support Exemption 4 claims, business entities often find it necessary to provide supplementary information regarding the purpose and scope of the records in question. Indeed, as the courts have acknowledged, a company seeking to protect proprietary information often finds itself in a difficult situation. In setting forth its arguments, the company runs the risk that it will provide competitors information they would not otherwise obtain. *See Braintree Electric Light Department v. Department of Energy*, 494 F. Supp. 287, 291 (D.D.C. 1980).

17. The presence of competition in the CPE market has been well documented.[11] Even under the circumstances now presented by AT&T, however, we remain unpersuaded that disclosure of the CPE charts, with the deleted customer proprietary information, is likely to result in substantial competitive harm to AT&T-IS. Without the customers' names and locations, there is only a remote possibility that a competitor would be able to ascertain exactly what portion of the data pertains solely to Minnesota. Further, the 75 pages of CPE information in our possession concern approximately 1,275 customers. Thus, even if all of these are AT&T-IS accounts, it is unlikely that a competitor would be able to properly identify each customer listed and thereby cause substantial competitive harm to AT&T-IS.[12] In addition, the information contained in the excised CPE charts does not establish a pattern that may reveal AT&T-IS's marketing strategy. In some instances, customers assigned to the same account executive and with similar service needs and equipment were not equally approached by AT&T-IS. Moreover, without the customers' locations, it is unlikely that a competitor would be able to assess the specific target areas of AT&T-IS's marketing activities and develop a marketing strategy that would be detrimental to AT&T-IS's competitive position. In light of this, we agree with the Bureau's determination to release the excised CPE documents.

18. Finally, we are mindful of the policy considerations raised by AT&T concerning the possible misuse of the FOIA in the unusual circumstances presented here. Nevertheless, absent a showing that the documents fall within one of the specific exemptions prescribed by Congress in the FOIA, disclosure of the records is required under the statute.

19. In view of the foregoing analysis, we will not disturb the Bureau's ruling.

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[11] *See In the Matter of Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)*, FCC 83-551, Mimeo No. 340060, released December 15, 1983.

[12] We observe that if the investigation reveals that there has been a violation of the *Computer II* rules, AT&T-IS will be required to disclose *all* the information contained in the documents at issue. We also ascribe to Ms. Bonn's observation that Exemption 7(A) of the FOIA does not preclude disclosure of these documents. That exemption shields investigatory records compiled for law enforcement purposes to the extent that production would interfere with enforcement proceedings. 5 U.S.C. § 552(b)(7)(A). Thus, Exemption 7(A) seeks to protect the Government from the harm that would result from premature disclosure of investigatory records compiled in connection with pending or contemplated law enforcement proceedings. *See NLRB v. Robbins Tire & Rubbers Co.*, 437 U.S. 214, 232 (1978). Here, the CPE information does not reveal the scope, limits and methods of our inquiry. In light of this, we have determined that release of these documents would not harm our on-going investigation, and therefore, that the documents do not fall within the purview of Exemption 7(A).

Accordingly, IT IS ORDERED, That the application for review filed by the American Telephone and Telegraph Company on behalf of AT&T Information Systems IS DENIED. The request for these records will not be implemented, however, until AT&T Information Systems has been afforded the opportunity to obtain a judicial stay of this order, provided that judicial review is sought and a stay requested within 10 working days of release of this order. If judicial stay is not sought, the excised documents will be produced for inspection. *See* Section 0.461(h)(4) of the Commission's Rules, 47 C.F.. § 0.461(h)(4).

The officials responsible for this action are the following Commissioners: Mark S. Fowler; Chairman, James H. Quello, Mimi Weyforth Dawson, Henry M. Rivera and Dennis R. Patrick.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

Application, for Review
Fairness Doctrine, Contrasting Viewpoint, Duty to Encourage

Application for review of Mass Media ruling which denied Fairness Doctrine complaint denied. Only where an issue is found to be of critical importance to a particular community would a question be raised as to whether a licensee had fulfilled its obligation under the first part of Fairness Doctrine.
—*Brent Buell, et al.*

FCC 84-117

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of

Brent Buell, et al.

against

Station WCBS-TV
New York, New York

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 1984; Released April 5, 1984

BY THE COMMISSION:

1. The Commission has before it an Application for Review of the Mass Media Bureau's September 6, 1983 Staff Ruling on a complaint filed by Brent Buell and others against WCBS-TV, New York, New York.[1]

2. During its October 28 and 29, 1982 newscasts, WCBS-TV broadcast a two-part special report entitled "Straight Talk about Gays." Complainants alleged that the presentation failed to present contrasting viewpoints on the issue of "Do homosexual persons have to remain homosexual, which now includes risking AIDS and Kaposi's sarcoma; or can homosexuality truly change, and the terror, disease, pain and death accompanying homosexuality be prevented?"

3. In its ruling, the Bureau stated that it would not find the licensee unreasonable in determining that the news report did not address the

[1] A copy of the ruling is attached as an Appendix.

issue of whether homosexuals can change their sexual preferences through the study of Aesthetic Realism. The Bureau also found that the complainants failed to present evidence of the broadcaster's response to its fairness complaint,[2] and failed to establish reasonable grounds for their contention that WCBS-TV failed to present contrasting viewpoints in its overall programming.

4. In the Application for Review, the complainants stress that the gravaman of their allegations is "the total absence of news" about the Aesthetic Realism approach to homosexuality. They state that anyone desiring to change from homosexuality can do so through the study of Aesthetic Realism.[3] Complainants assert that because of the grave health problems associated with homosexuality (Acquired Immunodeficiency Syndrome (AIDS), for example), the station's failure to present programming on Aesthetic Realism is in violation of its fairness obligation to inform the public on matters of "urgent public interest." In support of this assertion, complainants state that during the past twelve years, while WCBS-TV has reported on the failure of psychiatry to change homosexuals, it has not presented even one program on Aesthetic Realism. As a result, the complainants request that the Commission require WCBS-TV to report on the ability of homosexuals to change their sexual orientation through the study of Aesthetic Realism.[4]

Discussion

5. The Fairness Doctrine imposes two obligations on a broadcaster. The first is to inform the public by broadcasting discussions of controversial issues of public importance. Secondly, when a broadcaster presents one side of a controversial issue of public importance, it is required to afford a reasonable opportunity for contrasting viewpoints.

6. An examination of the Application for Review reveals that the complainants did not address the same arguments which they made in their initial filing of April 1, 1983. In the latter document they alleged that WCBS-TV had failed to comply with the second part of the Fairness

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[2] In this regard, the complainants have now submitted CBS' January 11, 1983, response to their fairness concerns. CBS rejected the complaint "as being without legal merit."

[3] The complainants describe "Aesthetic Realism [as] a philosophy, founded by Eli Siegel (1902-1978), who defined it" as follows:

> Aesthetic Realism is a way of seeing the world and oneself that says: One, the purpose of everyone is to like the world; Two, the way to like the world and the things in it is to see both as the aesthetic oneness of opposites; Three, the greater danger for a person is to have contempt for the world and what is in it, despite their aesthetic structure.

[4] The complainants also request that the Commission hold a hearing in which those individuals who have studied Aesthetic Realism can have an opportunity to describe the significance of their sexual transformation.

Doctrine – to present contrasting viewpoints on a controversial issue of public importance. The complainants have submitted no information or made any arguments which would indicate that the Bureau erred in its findings as they related to the allegations initially raised, and therefore, we find no reason to reverse the Bureau ruling.

7. In their Application for Review, the complainants now assert that WCBS-TV violated its first obligation under the Fairness Doctrine by failing to inform the public on whether homosexuals can change their sexual preferences through the study of Aesthetic Realism. Complainants have raised a question of fact and law which was not before the Bureau. Under Section 1.115(c) of the Commission's rules (47 C.F.R. § 1.115(c)) no application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass. Further, facts not raised in the initial complaint may be presented to the designated authority in a Petition for Reconsideration. *See* Section 1.106 of the Commission's rules (47 C.F.R. § 1.106). Therefore, the argument concerning CBS' failure to inform its viewing audience on the ability of homosexuals to change their sexual preferences through the application of the principles of Aesthetic Realism is not properly before the Commission. Accordingly, we deny the relief requested.

8. Nevertheless, even if we were to consider the argument concerning the absence of coverage on the ability of homosexuals to change their sexual preferences we would still find it to be without merit. Only in rare instances, where a licensee has failed to give coverage to an issue found to be of critical importance to its particular community, would questions be raised as to whether a licensee had fulfilled its fairness obligations. *Rep. Patsy Mink,* 59 FCC 2d 987, 994-97 (1976). Complainants have made no such showing. The Commission has repeatedly held that the selection of the particular controversial issues to be broadcast is a matter properly left to the discretion of the licensee. *Editorializing by Broadcast Licensees,* 13 FCC 1246, 1251 (1949), *Horace P. Rowley, III,* 48 FCC 2d 99 (B/c Bur. 1974). In the *Fairness Report,* we stated:

> [W]e have no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community.
>
> We wish to emphasize that the responsibility for the selection of program material is that of the individual licensee [*Fairness Report* 48 FCC 2d 1, 10 (1974)].

9. In view of the foregoing, we affirm the Bureau's ruling. Therefore, pursuant to Section 1.115(g) of the Commission's rules and regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

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Appendix

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re complaint of

Brent Buell, et al.

against

Station WCBS-TV
New York, New York

Staff Ruling

Adopted: September 1, 1983; Released: September 6, 1983

BY THE CHIEF, FAIRNESS/POLITICAL PROGRAMMING BRANCH:

1. The Commission has before it a Fairness Doctrine complaint, filed by Brent Buell and others against WCBS-TV, New York, New York.

2. The complainants allege that the licensee violated the Fairness Doctrine in its airing of a two-part special report entitled "Straight Talk about Gays," which ran during the newscasts of October 28 and 29, 1982. They define the controversial issue of public importance as, "Do homosexual persons have to remain homosexual, which now includes risking AIDS and Kaposi's sarcoma; or can homosexuality truly change, and the terror, disease, pain, and death accompanying homosexuality be prevented?" (Emphasis omitted.) The complainants assert that those individuals who signed the complaint "are regular viewers of WCBS-TV, and [they] consistently watch its news and informational programming." They state that the message given by the licensee throughout this two-part series, either implicitly or explicitly, was that homosexuals cannot change. They further allege that this series did not include a spokesperson who advocated that homosexuals can change by learning the principles of Aesthetic Realism.[1] The complainants allege that WCBS-TV "willfully suppressed" the fact that homosexuals can change through studying the principles of Aesthetic Realism. They also assert that because of the health danger associated with being homosexual, WCBS-TV has abused its position as a licensee by failing to inform its viewing audience of a means to prevent homosexuals from contracting homosexual related diseases.

3. The complainants contend this issue to be controversial and of public importance as evidenced by the petition signed by more than 4000 people who requested that WCBS-TV

[1] The complaints describe "Aesthetic Realism [as] a philosophy, founded by Eli Siegel (1902-1978), who defined it" as follows:

> Aesthetic Realism is a way of seeing the world and oneself that says: One, the purpose of everyone is to like the world; Two, the way to like the world and the things in it is to see both as the aesthetic oneness of opposites; Three, the greatest danger for a person is to have contempt for the world and what is in it, despite their aesthetic structure.

report on the ability of homosexuals to change through the study of Aesthetic Realism. They assert that the above-stated issue to be controversial because of the daily demonstrations held in front of the CBS buildings in New York City pertaining to the licensee's failure to present programming on Aesthetic Realism. As additional evidence of controversiality, they refer to a number of newspaper and magazine articles, television programs and news broadcasts, which addressed either the causes of homosexuality or whether homosexuals can change. The complainants allege the subject issue to be of public importance because after three national broadcasts which revealed "that men could change from homosexuality through the study of Aesthetic Realism (Susskind Show, 1971; Snyder Show, 1975; Donahue Show, 1981)," the Aesthetic Realism Foundation received hundreds of inquiries from men and women interested in changing their sexual orientation. They also assert that the increased incidence of AIDS and Kaposi's sarcoma is further evidence that the stated issue is of public importance. They submit a list of magazine and newspaper articles which discuss these diseases.

4. Under the Fairness Doctrine a broadcaster has two obligations. The first is to inform the public by broadcasting discussions of controversial issues of public importance. Initially, decisions regarding which controversial issues to broadcast and how much time to devote to these issues are within the broadcaster's discretion. The broadcaster's second obligation is to afford a reasonable opportunity for the presentation of contrasting viewpoints when it presents one side of a controversial issue of public importance. This policy does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcaster has an affirmative duty to encourage and implement the presentation of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs.

5. Both sides of an issue need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the Fairness Doctrine is designed to assure rather than the right of any individual to broadcast his or her views. It is the responsibility of the broadcaster to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue.

6. In reviewing complaints under the Fairness Doctrine, the Commission's role is limited to determining whether the broadcaster has acted reasonably and in good faith. *Fairness Report* 48 FCC 2d 1, 9 (1974). Therefore, in order for the Commission to make this determination, it must be presented with evidence of the broadcaster's response to a complainant's fairness allegations. This showing not only gives the Commission a basis for performing its administrative reviewing function, but it also serves to insure that a complainant contacts the broadcaster prior to filing a complaint with the Commission. It is the Commission's experience that when a complainant first brings his concerns to the broadcaster's attention, the parties will often be able to resolve the matter without Commission involvement. The complainants submitted a copy of their complaint to the licensee. However, they failed to include the licensee's response as part of their complaint. On this ground alone we can dismiss the complaint. *See Allen C. Phelps*, 21 FCC 2d 12, 13 (1969). However, we believe the following comments may be helpful to the complainants.

7. In filing a fairness complaint, a complainant must establish reasonable grounds for believing that the station or network broadcast only one side of the issue in its *overall* programming. Such a claim might be based on an assertion that the complainant is a regular listener or viewer who consistently or as a matter of routine listens to the news, public affairs and other nonentertainment programs carried by the broadcaster involved. This does not require the complainant listen to or view the station twenty-four hours a day, seven days a week. However, a complainant should indicate those time periods when he or she viewed or listened to the station's programming, including the frequency and length of time. *See John Howard*, 55 FCC 2d 777, 780-81 (1975); *American Security Council*, 94 FCC 2d 521 (FCC 83-292, July 12, 1983). In this regard complainants have asserted that the signatories of the

complaint "are regular viewers of WCBS-TV, and [they] consistently watch its news and informational programming." We find this statement to be a mechanical repetition of viewing habits, which is an inadequate basis for establishing a prima facie fairness complaint. *John Howard*, 55 FCC 2d at 780-81.

8. We also note that the WCBS reporters who appeared on "Straight Talk About Gays" described this two-part series as a "special report on gay life." The complainants allege that in discussing "gay life," the licensee, explicitly and implicitly, addressed the issue of "whether homosexuals can change?" However, it appears from an examination of the program's transcript that there was no statement which directly focused on whether homosexuals can change. Therefore, we would not find the licensee unreasonable in concluding that the subject report did not address the "change" issue in an obvious and meaningful fashion. *See National Committee for Responsive Philanthropy*, 652 F.2d 189 (1981); *Fairness Report*, 48 FCC 2d at 12-13. Furthermore, even if the program implicitly raised the issue of whether homosexuals can change, the Commission has clearly indicated that the Fairness Doctrine does not apply to every statement which may be presented on a particular program. In this regard we have stated:

> Clearly the licensee must be given considerable leeway for exercising reasonable judgment as to what statements or shades of opinion do require offsetting presentation. If every statement, or inference from statements or presentations, could be made the subject of a separate and distinct fairness requirement, the doctrine would be unworkable. More important, . . . such a policy of requiring fairness on each statement or inference from statements would involve this agency much too deeply in broadcast journalism. We would become an intergral part of broadcast journalism, passing on thousands of complaints that some statement, or inference to be drawn from a statement, on a newscast or other news show had not been offset by a countering presentation. A policy of requiring fairness, statement by statement or inference by inference, with constant governmental intervention to try to implement the policy, would simply be inconsistent with the profound national commitment to the principle that debate on public issues should be "uninhibited, robust, [and] wide-open . . .." [*National Broadcasting Co.*, 25 FCC 2d 735, 736-37 (1970) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).]

9. In view of the foregoing, no action is warranted on the complaint at this time.

10. Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of public notice of this document (see Commission Rule 1.4(d) [47 C.F.R. § 1.4(d)] by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Commission Rule 1.115 (47 C.F.R. § 1.115).

FEDERAL COMMUNICATIONS COMMISSION

MILTON O. GROSS, CHIEF *Fairness/Political Programming Branch*
Enforcement Division
Mass Media Bureau

Foreign Language Broadcasts, See Also Programming, Foreign
Programming, Specialized
Renewal, Applicant v. New Applicant

Renewal applicant preferred over challenger on basis of licensee's past broadcast record. Challenger gets demerit for carelessness in prosecuting its application. Renewal applicant receives no preference for proposed specialized programming.
—*Broadcast Communications*
BC Docket No. 81-157

FCC 84-99

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In re Applications of	
BROADCAST COMMUNICATIONS, INC. Evanston, Illinois	BC Docket No. 81-157 File Nos. BRH-85 BRSCA-206
For Renewal of Main, Auxiliary, and Sub-Carrier Authorization Licenses of Station WOJO (FM) Evanston, Illinois	
GENESIS BROADCASTING LIMITED Evanston, Illinois	BC Docket No. 81-158 File No. BPH-10386
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1984; Released: March 20, 1984

BY THE COMMISSION:

1. The Commission has before it: (a) an Application for Review of the Review Board's Decision herein[1] filed May 4, 1983, by Genesis Broadcasting Limited (Genesis); (b) an Application for Review of the Review Board's

[1] 93 FCC 2D 1162 (1983).

Decision herein filed May 4, 1983, by Broadcast Communications, Inc. (BCI); (c) an Opposition to (a) filed June 17, 1983, by BCI; (d) an Opposition to (b) filed June 17, 1983, by Genesis; and (e) a Consolidated Opposition to (a) and (b) filed June 17, 1983, by the Chief, Mass Media Bureau.

2. We have determined that BCI should not receive a preference for its proposed Spanish language programming. The record evidence demonstrates that there is a substantial amount of Spanish language programming in Station WOJO's service area during the day,[2] but that at night WOJO serves an area not served by other Spanish language stations.[3] Although Evanston, Illinois has two daytime-only AM stations and one non-commercial educational FM station, Station WOJO is the only fulltime commercial station licensed to Evanston and thus provides the only local (Evanston) commercial radio service at night. There is an obvious need for both the specialized programming proposed by BCI and the general market programming proposed by Genesis. Therefore, neither applicant is due a preference for its proposed programming.[4]

3. Except for our determination that BCI should not receive a preference for its specialized programming, we concur in all significant respects with the Review Board's Decision herein. Thus, we agree that BCI's past broadcast record was substantial as defined by *Cowles Broadcasting, Inc.*,[5] and therefore deserves a significant comparative preference or what is termed a "renewal expectancy," which outweighs Genesis' integration and diversification preferences. We also concur with the Board's assessment of a moderate demerit against Genesis for exhibiting carelessness in filing and prosecuting its application through

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[2] *See* paras. 28 and 29 of the Initial Decision, 93 FCC 2d 1176, 1184-6 (1982).

[3] Station WOJO would provide the only Spanish language radio service at night to an area of 833 square miles in which 116,000 Hispanics live. *See* BCI Exhibit 17, pp. 5-7. Evanston, which is BCI's city of license, has a population of 80,113, of which 1,715 persons are Hispanic.

[4] Our action herein is consistent with our award of a substantial preference to American International Development, Inc. (AID) for its proposed Spanish language programming in *American International Development, Inc. (AID)*, 75 FCC 2d 67, 96, 107 (ALJ 1979), *affirmed*, 86 FCC 2d 808, 818 (1981). AID was an applicant for a new FM station to be licensed to Phoenix, Arizona, which was already being served by several stations with general market formats. In *AID* we found that a significant Hispanic population resided *both* in Phoenix and within the rest of AID's proposed 1 mV/m contour and that there was a dearth of Spanish language programming in the Phoenix area. In the case now before us, BCI's community of license is Evanston, Illinois, which has about 1,700 Hispanics out of a total population of about 80,000. Thus, there is only a small Hispanic population in Evanston. Further, Station WONX, a daytime-only commercial radio station licensed to Evanston, is a Spanish language station. Lastly, we note that WOJO is the only fulltime broadcast station assigned to Evanston.

[5] 86 FCC 2d 993, 1006 (1981), *affirmed sub nom., Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982).

the hearing process.[6] Therefore, BCI is the clear winner in this proceeding.

4. However, Genesis has raised arguments concerning BCI's past broadcast record which warrant further comment. Genesis claims that BCI has provided truly minimal service to the residents of Evanston, Illinois. Several individuals, including two Evanston aldermen, stated that Station WOJO was not responsive to Evanston's needs and interests because too much of its programming was in Spanish and directed to audiences residing mostly outside of Evanston. Without making any specific reference to Station WOJO, a third alderman expressed his interest in having a station in Evanston which would broadcast a significant amount of English language programming, while a fourth alderman stated that Evanston needed more locally-oriented programs. None of the aldermen's statements explained whether their comments related to the license term being examined in this proceeding (*i.e.*, 1973-1976) or the degree to which they were familiar with Station WOJO's programming.[7] Further, none of the foregoing witnesses identified any local public issues which might have been omitted by the licensee. Other testimony praised WOJO for its public service to Hispanics in Evanston and the Chicago metropolitan area. The subjective preferences of various witnesses, both pro and con, do not provide a basis for altering the conclusion that BCI's past broadcast record was substantial and thus merits a significant comparative preference in this proceeding. In this respect, paragraph 4 of the Review Board's Decision summarizes the portion of the evidentiary record which provides a basis for an objective analysis of the licensee's broadcast record.

5. Further, Genesis argues that BCI fell short of broadcasting the amount of news and public affairs programs it stated it would broadcast during the relevant license term of 1973 to 1976. In its 1973 renewal application, BCI proposed to provide 21.49 percent of its overall programming in the following nonentertainment categories: news, 5 percent; public affairs, 1.49 percent, and all "other" programs (exclusive of entertainment and sports), 15.0 percent. In its 1976 renewal application, BCI initially computed the following percentages of its programming as constituting nonentertainment programs presented during the composite week: news, 4.1 percent; public affairs, 0.3 percent, and all "other"

[6] In its application for Review, BCI argues that the Review Board erred when it failed to overrule the Presiding Judge's refusal to add a basic disqualifying issue against Genesis for neglecting to report the filing of a criminal complaint against Mr. Renken, who is Genesis' President, as required by Section 1.65 of our Rules. This argument is now moot. The hearings have been completed and BCI has proven itself to be the winner based on the existing record. There is no reason to conduct further hearings to determine whether Genesis should have lost by a wider margin than the present record indicates.

[7] One alderman stated that he was not familiar with WOJO's programming.

programs, 14.0 percent, for a total of 18.4 percent. BCI recomputed those percentages most recently in October 1981, explaining that it had misread some of the programming logs in previous computations. These most recent figures are: news, 5.3 percent; public affairs, 0.3 percent; and "other" programs, 15.3 percent, for a total of 20.9 percent nonentertainment programming.[8] Although Genesis appears to be relying upon the initial 1976 computations, it has not demonstrated that the most recent figures are not reliable. Like the Review Board, we accept the most recent computations as accurate. Thus, BCI did not broadcast the amount of public affairs it proposed, but exceeded the amount of news and "other" programming it had initially planned to air. Further, BCI has given an adequate explanation as to why it broadcast so few public affairs programs, namely, that certain entities which produced those programs discontinued producing them.[9]

6. We find that there is no significant discrepancy between BCI's proposed (21.49 percent) and performed nonentertainment programming, whether one relies on the original (18.4 percent) or the most recent (20.9 percent) computations for BCI's composite week. Further, whether one utilizes the original or the most recent computations for BCI's composite week, BCI exceeded the average and median percentages of nonentertainment programming broadcast during the composite week by the other commercial FM stations serving the Chicago area.[10] Just as we compared similarly situated television licensees in *Cowles Broadcasting, Inc.*,[11] we find it more meaningful in measuring BCI's performance to compare similarly situated FM stations than to compare all radio stations in the Chicago market.[12]

7. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review of the Review Board's Decision herein filed May 4, 1983, by Genesis Broadcasting Limited IS GRANTED to the extent indicted in this Memorandum Opinion and Order and IS DENIED in all other respects, the Application for Review of the Review Board's Decision herein filed May 4, 1983, by Broadcast Communications, Inc. IS DENIED, and the Review Board Decision, FCC 83R-24, released April 4, 1983, 96 FCC 2d 1162, is MODIFIED as reflected herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

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[8] *See* paras. 32-35 of the Initial Decision, 93 FCC 2d 1176, 1186-87.

[9] *See* BCI Ex. 23, p. 205.

[10] *See* the chart in paragraph 36 of the Initial Decision, *supra.*

[11] 86 FCC 2d 993, 1006-07 (1981).

[12] *See* para. 36, note 10 of the Initial Decision, *supra.*

CATV Cross Ownership by Broadcasters

Section 76.501(b)(2) amended to grandfather all existing non-egregious co-owned, co-located cable/broadcast television cases, action deferred for those situations defined as egregious pending the conclusion of a general rulemaking proceeding involving Section 76.501.

—*CATV Cross Ownership*
Docket No. 20423

FCC 84-114

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 76, Subpart J, of the Commission's Rules and Regulations Relative to Cable Television Systems; and Postponement of Divestiture Requirement of Section 76.501 Relative to Prohibited Cross-Ownership in Existence on or before July 1, 1970	Docket No. 20423

THIRD REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 29, 1984; Released: June 1, 1984

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING AND ISSUING A STATEMENT.

Introduction

1. In this *Third Report and Order*, we are abandoning our proposal to require divestiture of all cross-owned cable television and local broadcast television interests. For those cable system/broadcast station cross-interests considered 'non-egregious" (i.e., the broadcast station is not the only commercial broadcast station providing principal community service to the cable community), we are reaffirming our earlier decision to grandfather such combinations that were in existence on or before July 1, 1970. With regard to "egregious" situations, we are defering comment

and action until the Commission considers a pending petition requesting reevaluation of Section 76.501 of the Rules.

Background

2. Section 76.501 of the Commission's Rules prohibits cross-ownership between a cable television system and a national television network or a local television broadcast station. Specifically, Section 76.501(a)(2) restricts cross-ownership between a cable television system and a broadcast station whose predicted Grade B contour overlaps the area served by the cable system. Section 76.501(b)(2) grandfathers those "non-egregious" cable/broadcast station cross-interests that were in existence on or before July 1, 1970 and defines the effective date to be applied to cause divestiture of those "egregious" cable/local television entities which existed prior to the adoption of the cross-ownership restrictions.[1]

3. By *Further Notice of Proposed Rulemaking* (*Further Notice*), Docket 20423, 81 FCC 2d 150 (1980), the Commission proposed a requirement of complete divestiture of all remaining cable television/local broadcast station cross-interests and requested comments regarding the adoption of a waiver policy for such divestiture cases. Specifically, comments were sought regarding: (1) the differences between cable television/broadcast station and broadcast station/newspaper divestiture situations; (2) the factors pertinent in evaluating the issues involved in cable/broadcast divestiture; and (3) "all criteria appropriate for evaluating *ad hoc* whether divestiture is a necessary precondition for the attainment of the public interest objectives underlying our cross-ownership rules."[2]

4. The long history of Commission policy concerning cable/broadcast cross-ownership was fully detailed in the *Further Notice* and will not be repeated here.[3] We note, however, that since 1970 when the present rule prohibiting common ownership of cable systems and broadcast television stations was adopted, the Commission has repeatedly addressed the issue

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[1] Section 76.501(b)(2) of the Commission's Rules defines the effective date of Section 76.501 relating to cross-ownership:

> The provisions of subparagraph (2) of paragraph (a) of this section are not effective until August 10, 1977, as to ownership interests proscribed herein if such interests were in existence on or before July 1, 1970 (*e.g.*, if a franchise were in existence on or before July 1, 1970), and will be applied to cause divestiture as to ownership interests proscribed herein only where the cable system is, directly or indirectly, owned, operated, controlled by, or has an interest in a non-satellite television broadcast station which places a principal community contour encompassing the entire community and there is no other commercial non-satellite television broadcast station placing a principal community contour encompassing the entire community.

[2] *Further Notice* at page 158.

[3] *Id.* at page 151 *et seq.*

of divestiture.[4] In 1975, we revisited the divestiture issue and amended the rules to grandfather most of the then-existing cable/broadcast cross-interests, and to require divestiture only in situations deemed "egregious."[5] Interested parties sought judicial review of the 1975 decision, but the Commission requested, and was granted, remand of that judicial proceeding.[6] The proceeding we conclude herein commenced as a consequence of the Commission-requested remand.

5. When we issued the *Further Notice* we reviewed the public interest goals on which the cross-ownership rules had been based. At that time, we proposed to require divestiture of all commonly-owned cable/broadcast interests, based on what we believed to be an "inherent conflict" between the operations of the two entities and the conviction that such conflict would lessen competition in the economic and ideological marketplaces. In light of our review of the comments before us,[7] we are no longer persuaded that complete divestiture is an appropriate means for achieving our public interest goals of enhanced competition in both the economic marketplace and the marketplace of ideas. Accordingly, for the reasons set forth below, we will not require divestiture of any of the remaining, non-egregious, commonly-owned cable/broadcast interests.[8]

Summary of Comments

6. Although the *Further Notice* was directed specifically to issues concerning the divestiture requirement of Section 76.501(b)(2), many commenters argue that Section 76.501 in its entirety should be abandoned. Community Antenna Television, Inc. (CATA), Marsh Media, Ltd. (Marsh), and the National Association of Broadcasters (NAB), the strongest proponents for elimination of the rule, challenge our premise that there is an inherent conflict between the interests of cable system and broadcast station operators which adversely affects market competition. CATA argues that, in the absence of evidence of actual abuses or lack of

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[4] *See Second Report and Order*, Docket 18397, 23 FCC 2d 816 (1970), *recon. denied*, 39 FCC 2d 377 (1973), which prohibited common ownership of broadcast television stations and cable television systems within the Grade B contours of the broadcast stations. At that time, existing interests in violation of the rule were ordered to be divested within three years. The deadline was subsequently extended to five years. *Memorandum Opinion and Order* in Docket 18397, 39 FCC 2d 377 (1973).

[5] *Second Report and Order* in Docket 20423, 55 FCC 2d 540 (1975), *recon. denied* 58 FCC 2d 596 (1976). Divestiture was required only in limited "egregious" cases where there was common ownership between the cable system and the only commercial broadcast station providing principal community service to the cable community. *See* Section 76.501(b)(2), note 1, *supra*.

[6] As a result of this remand, the divestiture requirement for egregious cases was stayed.

[7] A list of commenters is attached hereto as Appendix A.

[8] A list of existing cable system/local broadcast station combinations is attached hereto as Appendix B.

competition in the market, any Commission action is based on "pure speculation." Marsh concurs that Section 76.501 is premised on untested and theoretical presumptions, and as such, violates our "narrowly circumscribed jurisdiction to regulate CATV." Marsh would require a full evidentiary hearing to reevaluate the cross-ownership rule. In view of a pending petition filed by Marsh for deletion of Section 76.501 and an accompanying review of the underlying cross-interest prohibition, the NAB contends that any consideration of the imposition of a divestiture requirement would be "grossly unfair, patently arbitrary, and highly capricious."[9] Fetzer Broadcasting Company, Midessa Television Company, Inc., and CSIK, Inc., also argue for rescission of the rule. According to these commenters, there are no facts which indicate a need for it. They argue that in the absence of actual proof of widespread abuses, prohibition of cross-owned interests may well result in market situations contrary to the public interest.

7. In the vast majority of comments received, the parties oppose divestiture except in the most egregious cases, and support use of a liberal waiver policy.[10] Many commenters rely on the arguments advanced by the Commission in the *Second Report and Order* in Docket 18110 which required divestiture of commonly-owned broadcast/newspaper interests in 16 limited situations deemed to be egregious due to the absence of any other effective local media competition.[11] They argue that the standard adopted in Docket 18110 is appropriate here, and that any divestiture requirement which includes non-egregious cases, is inconsistent with our decision. Further, they argue that there are no new facts to justify a departure from the standard adopted in Docket 18110. Southern Cablevision, Inc. and others contend that the proposals of the *Further Notice* not only arbitrarily depart from the standards, but that they are founded on erroneous presumptions.

8. The commenters opposing divestiture in other than egregious cases also argue that the *Further Notice* proposal will not accomplish the desired ends of diversity. To the contrary, they cite several reasons to support their contention that forced divestiture will result in significant

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[9] On November 24, 1980, Marsh filed a petition to repeal Section 76.501 (RM-3810). In addition, our Office of Plans of Policy has completed a Staff Report which examines the cable cross-ownership rules and recommends deletion of Section 76.501. This proceeding, under the Administrative Procedure Act, is not broad enough to encompass this more general question regarding the validity of Section 76.501. We anticipate considering that question in a separate proceeding.

[10] Since our *Further Notice* specifically requested comment regarding proposed criteria for waiver, the commenters submit extensive arguments on the issue. However, in light of our decision to grandfather non-egregious cross-interests and to abandon our waiver proposal, we will not summarize these comments.

[11] 50 FCC 2d 1046 (1975).

public harms which more than outweigh the benefits to flow from the proposed rule.

9. First, the facts indicate that the effect, if any, of cross-owned cable system/broadcast stations on the economic and ideological marketplaces is *de minimis.* In this regard, Frazier, Gross, & Clay, Inc. (Gross Study), was commissioned by Chronicle Broadcasting Company (Chronicle) and others to conduct a study of the competitive performance of cross-owned and non-cross-owned cable systems, to determine whether there was evidence of retardation of cable system potential by present cross-owners. The Gross Study concludes that there is no significant difference between utilization of cross-owned and non-cross-owned systems.[12] Commenter Marsh commissioned a similar study, conducted by economist Dr. James C. Miller, III. This study also concludes that "it does not appear that there is a marked difference in the characteristics of cross-owned and non-cross-owned systems."

10. Next, the commenters argue that divestiture will result in less local ownership of both cable systems and television stations. Chronicle conducted a study of cross-ownerships voluntarily divested since 1970 in which it identified 63 cross-owned cable systems and 19 cross-owned broadcast stations. Of the cable systems divested, 94% were sold to multiple system operators, nearly half of whom also own cable systems in the same market. Of the 19 broadcast stations divested, 95% were sold to non-local owners. This trend, the commenters contend, will continue should complete divestiture be required. According to Chronicle, forced divestiture can only be expected to increase the cable holdings of the largest multiple system operators and increase the number of non-local, multiply-owned broadcast stations.

11. The commenters' third argument addresses the issue of continuity of service. Liberty Communications, Inc., argues that forced divestiture will result in economic hardships to the entities required to divest, and in a substantial loss of financial and program stability to the cable systems. Glendive Broadcasting Corporation argues that divestiture must be

[12] The Gross Study relied on data from a variety of sources, including *Television Factbook,* Services Volume, *Broadcasting Yearbook,* and research conducted by Paul Kagan Associates and the law firm of Fletcher, Heald and Hildreth. After comparing the average characteristics of 48 cross-owned cable systems with 81 systems divested since 1970, the Gross Study concludes: (1) the results still indicate that the average cross-owned cable system is not significantly different from the average system nationally in terms of such general characteristics as number of basic subscribers, basic monthly rate, monthly pay rate, channel capacity and radio services; and, (2) by all objective measures, cross-owners appear to have developed their cable systems to the same degree as other system owners and are offering on them a variety of program options. *See* Chronicle comments at pages 14 and 28. *See also* joint comments of Midcontinent Broadcasting Company and Rock Island Broadcasting Company at page 36 *et seq.*

balanced against the loss of stability and continuity of operations, reduction in local ownership, and the resulting reduction in owner-management. These factors, according to Glendive, coupled with the adverse impact as a result of local economic dislocations, will have a deleterious effect on market diversity.

12. Finally, these commenters argue that complete divestiture is inconsistent with Commission precedent and impinges impermissibly on protected constitutional freedoms. Many refer to our general unwillingness to require divestiture when adopting prospective rules, and cite as precedent our infrequent use of the requirement. Several also cite a line of cases, such as *Timkin Roller Bearing Co. v. U.S.*, 340 U.S. 593, 603 (1951), where the Supreme Court held that divestiture is not to be employed as a remedy "without regard to the type of violation or whether other effective remedies, less harsh, are available." Susquehanna Broadcasting Company argues that, in view of our 1975 decision to grandfather non-egregious combinations, any decision to require complete divestiture now would violate fundamental principles of procedural fairness. Susquehanna contends that deference should be given to cross-owners who, at least since 1975, have had reasonable expectations that their combinations would be permitted to continue. Chronicle agrees that to require divestiture of previously grandfathered combinations is patently unfair and violates the cross-owners' due process rights. The commenters conclude that a requirement of total divestiture would not withstand constitutional muster because it is neither premised on proof of actual abuses, nor is it the least drastic alternative to accomplish the goals of diversity.

13. Commenters who support our divestiture proposal argue that only truly independent and competitive sources can guarantee diversity in the economic and ideological marketplaces. The United States Department of Justice notes that since cable television's information carrying capacity, due to its multichannel nature, surpasses that of the other media, the impact of grandfathering co-located cable/broadcast situations is likely to be far more severe than that of grandfathering for other media. The Office of Communication of the United Church of Christ (UCC) concurs with the *Further Notice* that there is an inherent conflict of interests between cable systems and broadcast stations. UCC concurs that, unlike broadcast stations and newspapers which compete only for advertising, broadcast stations and cable systems compete for advertising revenues as well as for audience viewership. Thus, cable/broadcast ownership presents more serious obstacles which substantially reduce the likelihood of achieving maximum program diversity in the market. This situation, according to UCC, coupled with recent trends toward concentration of control in the cable industry, reflects a need for strict regulatory policy to minimize potential harms. UCC contends that separate ownership of local

television stations and cable systems is essential "if the public interest in increased program alternatives is to be given half a chance in the face of powerful trends toward even more homogenized programming."

14. The National Citizens Committee for Broadcasting (NCCB) also supports our divestiture proposal. NCCB argues that divestiture will maximize competition in the market and encourage development of the cable industry. According to NCCB, competition would generate sufficient revenues to provide the capital base needed to support additional services indigenous to the cable industry, such as public access channels, locally originated or leased channels that serve minority or other specialized audiences, and two-way communication services. Additionally, NCCB asserts that cable/broadcast cross-ownership violates the principles of Commission duopoly rules. NCCB contents that, owing to the "functional interchangeability" of broadcast stations and cable systems, as well as the nature of the competition between the two media, the potential for adverse, anti-competitive consequences is increased.

15. The supporters of our strict divestiture proposal, UCC, NCCB, and the Justice Department advocate adoption of a very limited waiver policy. Both the Justice Department and NCCB suggest a return to the original waiver standard adopted in 1970.[13] UCC would grant waivers only in rare circumstances where the cross-owner could demonstrate that divestiture would lead to less, rather than greater program diversity.

Discussion

16. The Commission has considered issues relating to cable television and local television station cross-ownership in numerous formal rulemaking and inquiry proceedings. More than a dozen decisions in these proceedings were issued along with many other opinions in which the issued arose in an enforcement or waiver context or in a station licensing, assignment, or renewal proceeding. It has, however, remained an unsettled area because, with changes in video market competition, changed perceptions of the technology and role of cable television, and intervening litigation, views on the general value of this type of cross-ownership rule and on the question of requiring divestiture of existing interests, have repeatedly changed. Although some have urged in their comments that Section 76.501 is based on untested and invalid theoretical presumptions and should be rescinded in its entirety, the scope of this proceeding is limited to the question of whether and to what extent a divestiture of existing cross-interests should be required. Although recent changes in the video landscape raise more general questions about the fundamental

[13] *Second Report and Order* in Docket No. 18397, *supra*, note 4, at page 821. Waiver applicants were required to demonstrate "that a cross-ownership ban would not result in greater diversity."

basis of these rules, we believe it useful to attempt to resolve the divestiture question separately, eliminating the uncertainty that has for so long affected operations in these cross-owned situations.

17. For purposes of this decision we take as given the goals on which these rules are based of increasing competition in the economic and ideological marketplaces, balanced in the divestiture context against our expressed concern with "other public consequences such as continuity of operations, local ownership, demand for capital equity and local dislocations."[14] In terms of the question of divestiture, many commenters argue and we agree, that the standard adopted by the Commission in Docket 18110, regarding broadcast/newspaper cross-ownership, is an appropriate model to follow here.[15] This standard has been reviewed and approved by the Supreme Court in the broadcast/newspaper station context and it therefore appears to be a useful point of departure for considering the issues now before us.[16]

18. In generally deciding against a divestiture requirement in Docket 18110, the Commission concluded that: 1) divestiture could result in reduced local ownership; 2) divestiture could result in an undesirable break in continuity of operation as the new owner would lack the long knowledge of the community acquired by the prior owners; 3) divestiture could result in significant economic dislocations; 4) divestiture would result in the elimination of owners with long records of service to the public; and 5) divestiture would result in disruption of the industry and hardship for individual owners.[17] All of these factors, it was concluded, could result in undesirable losses of service to the public. More generally, the Commission concluded that divestiture was a harsh remedy "to be reserved only where the need is overwhelming and the evidence unambiguous. . . ."[18] In affirming the Commission's judgment in this regard, the Supreme Court stated that "to the extent factual determinations were involved in the Commission's decision to grandfather most existing combinations, they were primarily judgmental or predictive in nature. . . . In such circumstances complete factual support in the record for the

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[14] *Second Report and Order*, Docket 20423, *supra*, at 544.

[15] In *Second Report and Order* in Docket 18110, *supra*, note 14, we held that the benefits of divestiture (the likelihood of increased diversity) must be balanced against the adverse consequences, including disruption of service, reduction in local ownership and control, and local economic dislocations. We reasoned, "under what circumstances then, should such ownership be disturbed? We have concluded that a mere hoped-for gain in diversity is not enough. Unlike prospective rules, divestiture introduces the possibility of disruption for the industry and hardship for individual owners." *Id.* at page 1078. Accordingly, we limited divestiture to those situations where we found that, without it, the likelihood of true diversity was minimal.

[16] *National Citizens Committee for Broadcasting v. FCC*, 436 U.S. 775 (1978).

[17] *Second Report and Order* in Docket 18110, 50 FCC 2d 1046, paras. 108-112 (1975).

[18] *Id.* at para. 114.

Commission's judgment or prediction is not possible or required. . . ."[19]

19. While a number of parties and our own *Further Notice* in this proceeding have suggested that this precedent is not applicable here, it now appears to us in many respects to be similar. In both situations, the Commission's early decisions permitted cross-ownerships, in the absence of abuse, in order to encourage established owners to use their expertise for the developing technology.[20] Also, our concern in both contexts has been with the consequences of a forced sale of a television station. Whether such a sale results from a rule relating to newspaper cross-ownership or from a rule relating to local cable television system cross-ownership, the result is identical. Parties finding this analogy unpersuasive may simply feel that in these situations it is the cable system rather than the television station whose ownership will be transferred. Our own experience, as reflected in a study appended to the Chronicle Publishing Co. comments, indicates that this is not a correct assumption and that it frequently has been the broadcast station that changed hands. Even if the contrary were true, we see no reason why the same adverse consequences to the public would not result from the dislocation of existing cable television system owners. At the outset, therefore, it appears to us that the parallels between the two situations are rather direct and that the broadcast/newspaper precedent should be followed in the absence of other distinguishing or countervailing factors.

20. In the *Further Notice* we suggested that there were distinguishing factors relating to the inherent conflict of economic interests between cable systems and television broadcasters. However, on further review, and particularly on completion of a more detailed review of the market situations specifically involved here, we do not find this conflict to suggest a harsher divestiture standard than that previously adopted. There are, in fact, a number of considerations not previously stressed that suggest a less stringent divestiture standard for the cable/broadcast than for the broadcast/newspaper situation.

21. First, the rules in question here and those in the broadcast/newspaper situation were designed to foster diversity of ownership as a means of enhancing competition in the marketplace of ideas. In this regard, however, it should be readily apparent that it is local daily newspapers and television broadcast stations that are the primary sources of local news and public affairs programming and that are editorial forces in the debate over matters of local concern. This question of diversity of voices was the principal focus of Docket 18110 and the reason for the concern in that proceeding with existing patterns of ownership. Cable television systems are also potentially influential sources of information

[19] *National Citizens Committee for Broadcasting v. FCC, supra*, slip op. at p. 46.

[20] See *First Order* in Docket 15415, 1 FCC 2d 387 (1965), at para. 7.

concerning local issues. They do not, however, approach daily newspapers and local television stations as opinion molders. Cable systems are very significantly increasing the diversity of programming and information available to the public through the carriage of satellite delivered news and other nonentertainment programming. That portion of the programming over which the cable system operator has direct editorial control, however, remains limited in comparison with the overall amount of programming distributed. At least with respect to the issue of diversity of viewpoints, we therefore conclude that a weaker case for divestiture is made out here than was shown to exist in the *Second Report and Order* in Docket 18110.

22. The other base for these cross-ownership rules – competition in the economic marketplace – although discussed in general in the *Further Notice* in this proceeding, was not specifically related to the individual situations actually involved in this proceeding. A review of the facts of these situations provides us with some additional reason to believe that the divestiture requirement proposed was an unnecessarily harsh one.[21] Although our primary concern is with local markets, we do note that the list of situations involved is not a long one and does not suggest any issue of national scope. Excluding the five situations identified as "egregious" under the existing rules, only thirteen other situations remain. Significantly the subscribers to the cable systems involved in these cross-ownership situations represent less than one half of one percent of the nation's television households and less than one percent of the total number of cable subscribers. The stations and systems identified represent a very small fraction of the more than 1400 television stations and 5700 cable television systems currently in operation. This sharply contrasts with the Commission's concern expressed in its *Memorandum Opinion and Order* in Docket 18397, 39 FCC 2d 377, 392 (1973), that in 1970 some 10% of the nation's cable subscribers were served by systems cross-owned by a co-located broadcaster. Looking to the remaining situations specifically, we find a number of reasons to suggest that divestiture is not as important, particularly in terms of economic competition, as it was thought to be when this proceeding was commenced. While these factors are not common to all of the situations, in the aggregate they suggest reason for a much reduced concern with permitting existing cross-ownerships to continue. They suggest, moreover, that it is highly likely that even if the rule was retained, waivers of the rule would be common enough to generally subsume the rule itself. A

[21] Appendix B lists the situations involved. It does not include those situations where specific waivers of the rule have already been granted or where sales have been announced. Some corrections to the list attached to the *Further Notice* have also been made based on the comments received.

proper concern for the most effective use of our scarce administrative resources suggests that such an exercise should not be undertaken unless there appear to be significant benefits to the public involved.

23. Several specific factors weigh against divestiture of the non-egregious co-located cable/broadcast situations. All but two of these cross-owned situations involve local owners. Many of these are individuals with few, if any, other media properties. Some of the cable systems are far removed geographically from the associated broadcast stations, significantly reducing the directness of the economic competition involved (see, for example, the situation involving the cable system in Sterling, Illinois, which is some fifty miles removed from the commonly-owned television station). Other situations are similar to that in Logan, Utah, where it is claimed that the cable system is outside the actual (as opposed to the predicted) Grade B contour of the cross-owned station. The small size of the cable community and cable subscriber base relative to the total circulation of the associated television station, in other instances, suggests the absence of direct competition for advertising revenues and reduces the possibility that any strategem could be developed to better the economic position of the cross-owner through reducing the output or raising the price of the broadcast station involved (KRON-TV, for example, is associated with cable systems whose total subscriber base represents approximately two percent of the station's total circulation). Also, some of the cable/station cross-ownerships involve satellite broadcast stations whose parent stations are far removed from the cable communities and which operate much like translators (KDLO-TV, Florence, South Dakota and KPLO-TV, Reliance, South Dakota are, for example, satellite stations[22]). Finally, overlaying these market specific situations is the fact that the Commission has never received any complaints concerning these cross-owned entities and there is no suggestion in the record of this proceeding demonstrating any concrete abuse that has resulted from the cross-ownership relations involved, all of which have been in existence for at least ten years and some of which stretch almost twenty years into the past.[23]

24. In light of these considerations we are no longer convinced that diversity will best be served by across-the-board divestiture. There are, as we said in *Second Report and Order* in Docket 18110 other public interest purposes which also concern us, and which we believe were not sufficiently addressed in the *Further Notice.* Divestiture is a harsh remedy. Its likelihood of aiding diversity must outweigh its detrimental

[22] In this regard see *Second Report and Order* in Docket 18110, 50 FCC 2d 1046, n. 6 (1975).

[23] *See* para. 9 *supra,* and accompanying study filed by Chronicle. Chronicle comments, Exhibit 2.

effects on other public interest goals, such as stability and continuity of service. We believe that our decision in *Second Report and Order* in Docket 18110, and again in the *Second Report and Order* in Docket 20423, in which we limited the use of divestiture to only the most egregious cases, was correct. We said then, and we still believe, that the likelihood of substantial disruption of service and attendant losses to the public, in most cases, outweighs the potential aid to diversity.

25. This brings us to disposition of the so-called "egregious" cases. In the *Second Report and Order* in Docket 20423, we amended Section 76.501 to define those cable/broadcast cross-ownership interests which we deemed egregious, and, accordingly, required divestiture.[24] In the *Further Notice* we listed 25 cross-owned situations, 8 of which were subject to divestiture pursuant to Section 76.501(b)(2) of the Rules. An updated list of cross-owned interests included herein as Appendix B indicates there are now 18 cross-owned situations of which 5 are still subject to divestiture under 76.501(b)(2).

26. As in the non-egregious situations, we believe there may be circumstances which mitigate the need for divestiture even in the egregious cases. As we have said, divestiture carries with it heavy burdens which should not be imposed without due consideration of the circumstances and alternative remedies. On the other hand, in originally limiting divestiture to situations deemed egregious, we determined that these were the situations in which diversity was most likely to be absent. We stressed the fundamental principle that diversity could only be had by expression of multiple viewpoints from divergent and antagonistic sources, and concluded that diversity was severely threatened by co-ownership of the only video voices in a given community.

27. Given the fundamental issues involved and the potential adverse effects on the public and system and station owners, we believe that further inquiry and analysis in this matter is required before any further action can be taken. Accordingly, we will temporarily defer action regarding these egregious cases and the applicablity of Section 76.501(b)(2) of the Rules. We reach this conclusion, in part, in light of the pending Marsh petition which requests deletion of Section 76.501 in its entirety.[25] We believe that the issues raised therein more adequately present the framework for resolution of this limited divestiture issue. Furthermore, we believe that deferral of action on these egregious cases works no undue hardship. Since those affected by Section 76.501(b)(2) have been on notice, at least since 1975, that divestiture was required, the

[24] *See* note 1, *supra.*

[25] *See* para. 6, *supra.* If after careful review of the Marsh petition it is determined not to commence the requested proceeding, a date will be established for full compliance with the requirements of Section 76.501.

possible harm resulting from the delay until the Marsh proceeding is concluded, is outweighed by the public interest in thorough scrutiny of the rule prior to Commission action.

28. In light of the foregoing, we will abandon the proposal of our *Further Notice,* which would have required divestiture of all cross-owned cable system/broadcast station interests. For those cable system/broadcast station cross-interests considered non-egregious, we reaffirm our position in the *Second Report and Order* in Docket 20423 and allow such situations to continue. Regarding those situations defined by Section 76.501(b)(2) as egregious, we defer comment and action until conclusion of the proceeding involving reevaluation of Section 76.501 of the Rules.

29. This action is taken pursuant to authority contained in Section 1, 2, 3, 4(i) and (j), 301, 303, 307, 309 and 403 of the Communications Act of 1934, as amended.[26]

30. Accordingly, IT IS ORDERED, That the proceeding in Docket 20423 IS TERMINATED.

31. IT IS FURTHER ORDERED That the effective date for divestiture specified in Section 76.501 IS STAYED pending further notice, as indicated in Appendix C hereto.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

*Appendixes A&B - may be seen in FCC Dockets Branch, 1919 M Street, N.W. Washington, D.C.

Appendix C

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

In Section 76.501 a Note is added at the end as follows:

Section 76.501

* * * * *

Note: The effective date for divestiture specified in Section 76.501(b)(2) is hereby suspended pending further Commission rulemaking action regarding common ownership of co-located cable television systems and television broadcast stations.

[26] Although Section 601(2) of the Regulatory Flexibility Act of 1980 (RFA) (P.L. 96-354) applies to rules adopted pursuant to Section 553 of the Administrative Procedure Act, the RFA is inapplicable where, as here, the underlying Notice of Proposed Rule Making was adopted prior to January 1, 1981. 5 U.S.C. 601 note (1980 Supp.).

DISSENTING STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Divestiture of Cable-Broadcast Television Cross-Interests in Existence on July 1, 1970.

Diversification of control over local mass communications media to promote ideological and economic diversity is among the most sacrosanct of this Commission's ownership policies.[1] It was in furtherance of this policy that the Commission, in 1970, ordered the divestiture of cross-owned cable-broadcast television combinations.[2] This decision, by further postponing the divestiture of "egregious" cable-broadcast television combinations, effectively marks a notable and unwarranted departure from that policy. Although the question of whether to order dissolution of "non-egregious" combinations is somewhat closer, I am persuaded that these combinations should also be subject to a divestiture requirement. Therefore, I must dissent to this *Third Report and Order* in its entirety.

With regard to egregious combinations, continued deferral of divestiture pending further inquiry is manifestly incorrect. In the 14 years and several public inquiries since the FCC first ordered the dissolution of these combinations, there has never been any question, until now, that such action was necessary to protect the public interest. In 1970, the Commission determined that where the same entity owned the only cable system and the only television station in a community, the public's interest in diverse programming could not be fully protected absent divestiture.[3] In 1975, the FCC reaffirmed this belief, declaring: "[T]here are certain situations . . . in which the importance of providing a second video voice attuned to and covering local issues outweighs the private equities and public dislocations brought about by a divestiture requirement."[4] While acknowledging the harshness of this course of action, the Commission found intolerable situations in which one entity had a "virtual monopoly over local video expression."[5] In 1980, when the Commission proposed a broader divestiture rule,[6] the need to dissolve egregious combinations was so well-established that the issue was not even discussed.

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[1] *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 780 (1978); *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394-95 (1965); *Multiple Ownership of Standard FM and Television Broadcast Stations*, 45 FCC 1476, 1476-77 (1964).

[2] *Second Report and Order in Docket 18397*, 23 FCC 2d 816, 820 (1970).

[3] *Id.*

[4] *Second Report and Order in Docket 20423*, 55 FCC 2d 540, 544 (1975).

[5] *Id.*

[6] *Further Notice of Proposed Rulemaking*, 81 FCC 2d 150 (1980)

The majority cites no change in circumstances or philosophy warranting reexamination of the FCC's prior determination regarding egregious combinations. Nevertheless, citing unidentified "fundamental issues," it determines that further inquiry is needed before final action can be taken. After 14 years of inquiry it is unclear what yet additional contemplation could offer, short of a newfound conviction that the cable-broadcast cross-ownership rule itself is no longer necessary or desirable – a conviction disavowed by the majority at the meeting during which this was adopted.

Similarly unpersuasive is the claim that this issue would be productively considered in the framework of the rulemaking petition filed by Marsh Media. Again, unless the majority questions the underlying cross-ownership rule, there is no reason to delay final action until Marsh Media's petition is considered. Furthermore, to function effectively and to maintain public credibility, this agency must enforce its rules until they are repealed, or until a sufficient case for stay or waiver is made. No such showing has been made here. The mere pendency of a rulemaking petition offers little, if any, legitimate reason to suspend the effective date of Section 76.501(b)(2) once again. The almost unprecedented footdragging evidenced by this new delay can only raise questions about the Commission's dedication to local market diversity, especially when the majority's assessment of the harm resulting from further delay conspicuously omits any consideration of the continuing harm to diversity of opinion in the affected markets. *See Third Report and Order* at para. 27.

With regard to the issue of whether non-egregious cable-broadcast television cross-interests should be divested, the competing arguments are closer. In the final analysis, however, I am convinced that a general divestiture rule is appropriate. A cable system owner wields editorial control over not one, not two, but numerous conduits of programming. Ownership of an over-the-air television station in the same geographic market by the same entity places yet another video outlet – a potential competitor in the economic marketplace and the marketplace of ideas – into its hands. Such consolidation of video voices plainly undermines our goal of maximum diversity of program and service viewpoints to a far greater extent than that posed by a newspaper-broadcast cross-interest and, thus, is sufficiently distinct to warrant a more stringent administrative response than that produced in Docket 18110.[7]

The majority's decision to grandfather non-egregious combinations follows the aforementioned newspaper-broadcast model. The majority now rejects the Commission's tentative conclusion in 1980 that the "inherent conflict" posed by cable and broadcast television cross-ownership calls for broader divestiture than that ordered in the newspaper-

[7] *See Multiple Ownership*, 50 FCC 2d 1046 (1975).

broadcast setting. The majority maintains that, if anything, a narrower rule is appropriate because cable systems do not approach newspapers or broadcasters as "opinion molders".[8] The majority further reasons that since the list of cross-owned systems is short, the impact of these combinations on diversity is *de minimis*[9]; that specific factors counsel against divestiture of these combinations in any event[10]; and, that no one residing in the affected communities has ever complained about the lack of diversity.[11]

While I agree that a more compelling case must be made to require dissolution of these non-egregious combinations, the justification proferred in support of grandfathering is sadly deficient. Initially, I disagree that since the cable medium is less of an opinion molder than newspapers or broadcasters, the implications of cable-broadcast television combinations for local diversity of expression is less significant. Whether or not the assertion about the actual influence of cable is true, the Commission has long emphasized a medium's *potential* to influence public opinion in fashioning structural rules.[12] This emphasis is sound, for the actual influence of a given medium is hard to measure and can vary over time.[13]

Nor does the limited number of cross-owned situations at issue in this proceeding suggest that these situations should be permitted to continue. Every member of the public is entitled to the benefit of our diversification policies. If anything, the relatively limited dislocation that would be caused by divestiture of non-egregious combinations argues for, not against, such a requirement. There may indeed be factors that mitigate

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[8] *Third Report and Order,* para. 21.

[9] *Id.* at para. 22.

[10] *Id.* at para. 23.

[11] *Id.* at para. 23.

[12] *See Second Report and Order in Docket 18397, supra,* 23 FCC 2d at 817; *Second Report and Order in Docket 20423,* 55 FCC 2d at 543.

[13] The majority's effort to downplay the significance of cable television as a media voice is curious, to say the least. The present Commission has relied heavily on the existence of the cable medium in many of its "unregulation" proceedings to support the proposition that the video marketplace is diversity rich and workably competitive. See *Deregulation of Commercial Television Service,* 94 FCC 2d 678 (1983); *Repeal of the National Multiple Ownership Rules,* Docket 83-1009, 48 Fed. Reg. 49438, Oct. 25, 1983; *Children's Television Programming and Advertising Practices,* Docket 19142, 49 Fed. Reg. 1704 (Jan. 12, 1984); *Repeal of the "Regional Concentration of Control" Provisions of the Multiple Ownership Rules,* Docket 84-19, 49 Fed. Reg. 19670 (May 9, 1984). The majority cannot have it both ways. Either cable competes in the marketplace of ideas or it does not. If it does not (or is not a full-fledged competitor because of its lack of emphasis on local programming, as the majority maintains) then its existence cannot be appreciably relied upon – as it has been – to justify reduced broadcast regulation. The Commission's perception of the video marketplace may change over time, but that perception cannot change from rulemaking to rulemaking simply to suit the deregulatory whim of the moment.

the need for divestiture in specific cases, but these factors should be considered in a waiver context, and not as a basis for rejecting a generic rule.[14] Pursuing a waiver approach would have signalled our commitment to economic and ideological competition in local markets, while allowing for relief where those objectives would not be compromised.

The majority's final argument – that divestiture should not be required absent evidence of abuse – is inconsistent with prior sound determinations by this agency that:

> diversity and its effects are . . . elusive concepts not easily defined, let alone measured, without making qualitative judgments objectionable on both policy and First Amendment grounds. [E]vidence of specific abuses by common owners is difficult to compile; the possible benefits of competition do not lend themselves to detailed forecasts."[15]

In conclusion, the decision to delay divestiture of egregious combinations once again is without rational foundation. The decision to grandfather non-egregious combinations, similarly, is not grounded in reasoned analysis. Divestiture is a harsh, but necessary, response in this case.[16]

Almost a decade ago, the Commission's game plan on cable-broadcast television divestiture was characterized as a "fox trot" – one step forward, one step to the side and one to the rear.[17] With this action, we have left the dance floor altogether.

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[14] As the Commission has previously noted: [T]hose arguments intended to show that the available competition media or other circumstances in a particular community offer such diversity that they are at least equivalent to another television station. . .. belong in a waiver context and not here. While the individual facts may present a convincing case in a waiver context that divestiture should not be required, we are not convinced that they suggest the need to revise a rule which is intended to be of general applicability. *Memorandum Opinion and Order,* 58 FCC 2d 596, 599 (1976).

[15] *FCC* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775, 776-77 (1978).

[16] Of course, I would be prepared to approve waiver requests upon proper individualized showings.

[17] *Second Report and Order in Docket 20423,* 55 FCC 2d at 549 (Dissenting Statement of Commissioner Glen O. Robinson).

Exception, to Initial Decision
Review by Commission
Satellite Earth Station, Construction

Exceptions to Initial Decision, FCC 81D-63, regarding authority to construct earth Station antennas and associated facilities at Hickam Air Force Base, Hawaii, and Finegayan, Guam for provision of 1.544 Mbps service dismissed or denied. Certain portions of the I.D. vacated.
—COMSAT
CC Docket No. 81-353

FCC 84-29

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Communications Satellite Corporation	**CC Docket No. 81-353 File No. 391-CSG-P-80**
For authority to construct a "Standard B" earth station antenna and associated facilities at Hickam, Hawaii, for use in the provision of 1.544 Mbps service, for operation with the INTELSAT System.	**CC Docket No. 81-354 File No. 392-CSG-P-80**
For authority to construct a "Standard B" earth station antenna and associated facilities at Finegayan, Guam, for use in the provision of 1.554 Mbps service, for operation with the INTELSAT satellite system.	**CC Docket No. 81-355 File No. 1-P-C-85**
For authority under Section 214 to provide 1.544 Mbps service through two "Standard B" INTELSAT earth stations located at Hickam, Hawaii and Finegayan, Guam, and for operation with the INTELSAT satellite system and,	
In the Matter of	

Western Union International, Inc. Complainant v. Communications Satellite Corporation	CC Docket No. 81-356 File No. E-80-8

Appearances

Lawrence M. DeVore, Daniel J. Harrold, Barry M. Heller and Sally Katzen on behalf of the applicant and defendant Communications Satellite Corporation; *Marc N. Epstein* and *John M. Scorce* on behalf of the complainant Western Union International, Inc; *J. Randolph MacPherson* on behalf of the intervenor Defense Communications Agency for the Secretary of Defense; *Theodore J. Fischkin* and *Susan I. Littman* on behalf of the intervenor ITT World Communications, Inc.; *Robert F. Heath* on behalf of the intervenor RCA Global Communications, Inc.; *Daniel J. Greenwald, III* and *Thomas J O'Reilly* on behalf of the intervenor Hawaiian Telephone Company; and *Susan S. Balk, Paul B. Froyd* and *Giovanna M. Longo* on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

DECISION

Issued: January 30, 1984; Released: February 2, 1984

BY THE COMMISSION: COMMISSIONER PATRICK NOT PARTICIPATING.

1. Before the Commission are exceptions to the Initial Decision (ID) of Administrative Law Judge Edward J. Kuhlmann in the above captioned proceeding. For reasons explained more fully below, we dismiss or deny the exceptions to the ID, and vacate certain portions of the ID.

Background

2. On November 16, 1979, the Communications Satellite Corporation (Comsat) filed applications to construct two satellite earth stations and associated facilities at Hickam Air Force Base, Hawaii, and Finegayan, Guam for the provision of 1.544 Mbps channels of communication to the United States Department of Defense (DoD). The service was to be provided by Comsat directly to DoD by means of Standard B earth stations located on DoD premises at both Hickam and Finegayan. Comsat was awarded the contract by DoD for this service after DoD requested and received competitive bids from a number of carriers, including Comsat. Several interested parties filed comments on and petitions to deny Comsat's applications. Several carriers believed that Comsat's

applications should be denied in part because of that carrier's allegedly unlawful bidding practices. Additionally, Western Union International, Inc. an unsuccessful bidder, filed a formal complaint requesting damages because of Comsat's allegedly illegal activities.[1]

3. By order released on September 9, 1980, the Commission denied Comsat's applications because of concern that construction of the earth stations and provision of this service would unreasonably burden other Comsat ratepayers. *Communications Satellite Corporation, supra.* Comsat and DoD appealed this order to the United States Court of Appeals for the District of Columbia Circuit. *See United States of America* v. *FCC,* No. 80-2246, docketed October 9, 1980).

4. After reviewing the record, however, the Commission was persuaded that at least some of the relevant facts in this case were clouded and that these matters should be explored in an evidentiary hearing. It therefore requested a remand from the court. The court remanded the case on January 27, 1981. On May 29, 1981, the Commission released a second order which vacated its September 9, 1980 order and designated certain issues for expedited evidentiary hearing. *Communications Satellite Corporation,* 86 FCC 2d 712 (1981) ("Designation Order"). The Commission also granted Comsat conditional authority to begin construction of the earth stations, and designated the complaint filed by Western Union International, Inc. (WUI), an international record carrier, (IRC) for hearing as well.

5. The following issues were designated for hearing:

(a) Whether the construction of the Hickam and Finegayan earth stations at ratepayer expense is required by the public interest, convenience and necessity within the meaning of Section 201(c)(7), 201(c)(9), and 201(c)(10) of the Communications Satellite Act of 1962, Included in the determination shall be:

1) whether the existing commercial earth station at Pulantat, Guam, is likely to be utilized in an efficient and profitable manner; and

2) whether the efficient utilization of the proposed facilities would necessitate future diversions of circuits from the Pulantat facility.

(b) Whether the rate proposed by Comsat represents a just, and reasonable charge for the proposed service within the meaning of Section 201 of the Communications Act, such that the total facility costs are borne solely by the users of this facility, and if not, what rate if any, should be prescribed under Section 205 of the Communications Act, In this regard Comsat must also show:

1) whether DoD and other U.S. government agencies will utilize the proposed facilities at full capacity according to Comsat's five-year projection; and

2) whether Comsat's allocation of total costs among the users is just and reasonable.

[1] A detailed description and procedural history of these applications may be found in *Communications Satellite Corporation,* 80 FCC 2d 170 (1980).

(c) In light of the evidence adduced pursuant to the foregoing issues, what disposition of the above-referenced applications would best serve the public interest, convenience, and necessity.

(d) The facts and circumstances concerning COMSAT's response to rate and service data requests from Western Union International, Inc. for earth stations and 1.544 Mbps service between such stations at Hickam AFB, Hawaii and Finegayan Naval Base, Guam.

(e) In light of the findings under issue (d). Whether Comsat's actions violated Sections 201(b), 202(a) of the Communications Act of 1934, as amended or Section 201(c)(2) of the Communications Satellite Act of 1962.

(f) If under issue (e), COMSAT is found to have violated Sections 201(b), 202(a) of the Communications Act of 1934, as amended or Section 201(c)(2) of the Communications Satellite Act of 1962, whether and to what extent COMSAT may be liable to Western Union International, Inc. for damages.[2]

6. The burden of proof and the burden of proceeding on issues (a), (b), and (c) were on Comsat, and on issues (d), (e), and (f) were on WUI. Comsat, WUI, DoD, the Chief, Common Carrier Bureau, and three other communications common carriers, ITT World Communications, Inc. (ITT), RCA Global Communications, Inc. (RCA), and the Hawaiian Telephone Company (HTC) participated in the hearings.

7. By Initial Decision (ID) released December 10, 1981, the ALJ made findings of fact and conclusions of law. *Communications Satellite Corporation,* FCC 81D-63, released December 10, 1981. There, the ALJ found, *inter alia,* that the rates which Comsat had bid and which had been accepted by DoD for the proposed Hickam-Guam service were unreasonable. The ALJ prescribed other rates, and denied WUI's claim for damages as speculative. The ALJ, however, did not, at least explicitly, rule on issue (c), whether Comsat's applications should be granted or denied. All of the parties filed exceptions and most filed reply exceptions to the ID.

8. On May 28, 1982, Comsat filed a motion for leave to withdraw its applications. In its motion, Comsat stated that pending the resolution of two other Commission proceedings, the Comsat structure proceeding[3] and the authorized user proceeding,[4] its World Systems Division:

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[2] As we will discuss more fully below, because Comsat has withdrawn its applications, we find issues (a), (b), and (c) to be moot. Exceptions going to those issues will be dismissed. The portions of the ID addressing those issues will be vacated. *United States* v. *Munsingwear,* 340 U.S. 36 (1950).

[3] *Communications Satellite Corporation,* 81 FCC 2d 287 (1980) *review pending sub nom. RCA Global Communications, Inc.* v. *FCC,* No. 83-1662, D.C. Circuit, filed June 16, 1983. Very briefly, this proceeding looked towards the potential restructuring of Comsat so as to separate its monopoly and its competitive activities. The Commission's decision in this docket (No. 80-634) may be found at 90 FCC 2d 1159 (1982).

[4] Notice of Proposed Rulemaking, Docket No. 80-170, 77 FCC 2d 535 (1980). Report and Order, *Authorized User Policy,* 90 FCC 2d 1394 (1982) (hereafter Authorized User II),

> will not offer to provide any new service, other than television service, directly to the U.S. Government, except in those instances in which the Government determines (1) that the national interest requires that the service be provided via earth stations located on the Government's premises and (2) that Comsat is uniquely qualified to provide the service and, therefore, the Government offers Comsat an opportunity to do so on a sole-source basis. In those instances (including the instant case) in which the Government determines that the national interest requires service via earth stations located on its premises but that such service may be provided by other carriers, Comsat will offer the carriers wishing to provide the service quotes for space segment only. [fn. omitted].

Comsat also noted that DOD had refused to accept service at the rates prescribed by the ALJ.

9. ITT, WUI, RCA, Comsat, and the Common Carrier Bureau recommended that the Commission dismiss Comsat's applications, but urged the Commission to rule upon the exceptions to the ID.

10. On February 1, 1983, the American Satellite Company (ASC) filed an application[5] to provide 1.544 Mbps service between Hickam and Finegayan for DoD and to construct satellite earth stations at those locations. It stated that the DoD had issued a request for proposal which was a resolicitation of the 1.544 Mbps service at issue in the instant proceeding and which had been awarded originally to Comsat. It further stated that DoD had awarded ASC and contract for this service on December 13, 1982 and that ASC was negotiating with Comsat to purchase the earth stations which Comsat had built at Hickam and Guam.

11. By application dated February 10, 1983, Comsat requested authority to provide the space segment portion of the Hickam-Finegayan service to ASC. It noted that DoD had on September 30, 1982 issued a request for proposal (DCA 200-82-R-0057, Hickam AFB - Finegayan, Guam - 1.544 Mbps SATCOM System) "to submit a competitive proposal to lease [to DoD] one 1.544 Mbps Digital Wideband Satellite Communications System between Hickam AFB, Hawaii and Finegayan, Guam." It further noted that the service was awarded to ASC.[6]

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vacated and remanded *sub nom. ITT World Communications, Inc.* v. *FCC*, No. 79-1046, January 13, 1984. In its Authorized User II decision, the Commission had reversed its earlier position and held that Comsat could serve end users directly rather than serving almost exclusively as a "carrier's carrier" *i.e.*, limited to the role of serving other common carriers rather than the public at large.

[5] File Nos. CSG-83-022-P/L, CSG-83-023-P/L and I-P-C-83-036. This application, as well as Comsat's application to provide space segment service to ASC, were granted by the Common Carrier Bureau on April 5, 1983. *See American Satellite Company*, Mimeo No. 3302, released April 5, 1983.

[6] *See* Comsat application, File No. I-P-C 83-040, filed February 10, 1983 at Appendix p. 1.

Discussion

12. We have granted Comsat's motion to withdraw its applications.[7] DoD has rebid and reawarded this service to ASC, which has filed its own applications to serve DoD and which have been granted.[8] The withdrawal of Comsat's applications as well as DoD's desire to receive service from ASC rather than Comsat persuades us that many of the issues raised by the parties in their exceptions are moot. As we pointed out above, issues (a), (b), and (c) sought to determine whether construction of the Hickam and Finegayan earth stations at ratepayer expense by Comsat was in the public interest, whether the rate Comsat proposed to charge was reasonable, and what disposition of Comsat's applications would best serve the public interest. Since Comsat no longer wishes to provide the service which is the subject of this proceeding and DoD appears to have no further interest in receiving this service from Comsat, there is no apparent reason why we should rule on exceptions relating to these particular issues. *See Mechling Barge Lines, Inc.* v. *U.S.* 368 U.S. 324 (1961).

13. For example, it appears that DoD's overriding concern as expressed in its exceptions was to receive service from Comsat at the contract rate and at the earliest possible date.[9] Since it is clear, given Comsat's withdrawal of its applications, that this cannot happen, it appears that most of DoD's exceptions are moot. DoD's other exceptions appear inappropriate for decision in view of changed circumstances, as we explain below.

14. DoD Exception A.1. argues that the ID erroneously failed to directly conclude that construction of the Hickam and Finegayan earth stations is required by the public interest, convenience and necessity. Comsat's applications, however, are no longer before the Commission. The Commission has, however, granted ASC's application, and concluded that construction of the Hickam and Finegayan earth stations would serve the public interest. DoD Exception A.1. is therefore dismissed as moot.

15. DoD Exception A.2., which objects to the ID's findings as to the potential for diversion of circuits from the existing Pulantat, Guam commercial earth station to the Finegayan earth station will also be dismissed as moot. Currently, DoD communications into and out of Guam traverse the Pulantat earth station, the Guam submarine cable head, and the Defense Satellite Communications System military earth station on

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[7] *See Communications Satellite Corporation*, Mimeo No. 83I-29, released March 28, 1983.

[8] *See American Satellite Company*, Mimeo No. 3302 (April 5, 1983).

[9] *See, e.g.*, DoD exceptions, January 11, 1982 at 12, 29-35, 42-44.

Guam.[10] When the Chief, Common Carrier Bureau granted Comsat temporary authority to begin providing the Hickam-Guam service only at the rates prescribed by the ALJ in the ID, however, *see Communications Satellite Corp.*, File No. I-P-C-85, Mimeo No. 1330, released December 31, 1981, Comsat informed the Commission that DoD refused to accept the service until Comsat was authorized to provide it at the contract price. *See* Comsat motion to withdraw, *supra* at 2. From this we may infer that DoD's willingness to transfer circuits to Finegayan from Pulantat is heavily influenced by the rates for the Hickam-Guam service. This inference is consistent with DoD Exhibits 2 and 8. Because the rate which ASC charges DoD appears to differ significantly from that proposed by Comsat,[11] we think that any attempt to ascertain whether and to what extent diversion will now take place from Pulantat would be highly speculative and cannot be made from this record.

16. DoD's remaining exceptions, B.1. - B.5., are all aimed at preserving the particular contract rate agreed to by DoD and Comsat in the face of the ALJ's prescription. The same is true of Comsat Exceptions I.A.-C. These exceptions are clearly moot insofar as the Comsat applications have been withdrawn and the Comsat-DoD contract rate is incapable of implementation under any circumstances.[12]

17. Many of the exceptions of the carriers and of the Common Carrier Bureau appear to be moot as well. RCA's exceptions, as well as those of HTC, are directed solely towards having Comsat's applications denied. Similarly, ITT Exception III. and WUI Exception I. request that Comsat's applications be denied. Common Carrier Bureau Exception II. requests that the Commission grant Comsat's applications. We think that Comsat's withdrawal of its applications effectively moots the need to grant or to deny either the applications or these particular exceptions. *Mechling Barge Lines, Inc.* v. *U.S.*, *supra.* Accordingly, they are dismissed as moot.

18. WUI Exception III. argues that the ID erroneously failed to find that Comsat's refusal to provide unbundled space segment violated Section 201(b) of the Communications Act. ITT makes the same argument in its Exceptions I.B. and II.A. Comsat, on the other hand, objects to the ID's finding that WUI could not bid its own earth station because Comsat refused to unbundle earth station from space segment charges. *See*

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[10] *See* DoD Statement in Support and Request for Status as an Authorized User, 4 December 1979 at 8.

[11] ASC proposed a monthly rate of $132,000 to provide one 1.544 Mbps duplex channel of communication between Hickam and Finegayan. Comsat proposed a monthly rate of $90,000 a month for such a channel. *See* ASC letter to Chief, International Facilities Division, February 7, 1983 Attachment at 1; Comsat application, Attachment 2 at 2.

[12] Common Carrier Bureau Exception I., which requests that the rates prescribed by the ALJ be modified, appears to be moot for this reason as well, and will be dismissed.

Comsat Exception II.C. We think these objections are moot given Comsat's present willingness to unbundle earth station from space segment charges for this service as well as for similar services as expressed in its motion to withdraw and in its comments in Docket No. 82-540, which we officially notice.[13]

19. The remaining exceptions deal largely with questions of a) the reasonableness of Comsat's conduct during the bidding process and b) a proper resolution of WUI's request for damages. Because Comsat has withdrawn its applications, any findings and conclusions of the reasonableness of its conduct would be in the nature of a declaratory ruling with prospective importance only were it not for the existence of WUI's complaint.[14] We deal first with WUI's complaint.

WUI's Complaint

20. As noted above, WUI filed a formal complaint pursuant to Section 208 of the Communications Act alleging that Comsat had violated the Communications Act, the Communications Satellite Act, and Commission orders and policies. WUI charged that Comsat had effectively precluded WUI from competing for the DoD Hickam-Guam award of service by quoting WUI a price of $91,425 per half circuit per month or $182,850 for a full duplex circuit per month for Standard B Earth Stations owned by the Earth Station Ownership Committee (ESOC) at Hickam and Finegayan, as well as INTELSAT space segment between those two earth stations. WUI also alleged that Comsat had told WUI that service could not be provided to WUI sooner than five months after FCC approval, while stating in its own application that Comsat said it would provide service directly to DoD more quickly i.e., by April 28, 1980.

21. WUI further alleged that Comsat's successful bid to DoD revealed that Comsat had offered to provide service between Hickam and Finegayan at a rate of $90,900 per month for a full duplex circuit (a rate approximately half that quoted to WUI by Comsat.) WUI charged that Comsat's conduct violated Section 202(a) of the Communications Act[15] and Section 201(c)(2) of the Communications Satellite Act.[16]

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[13] *See* Comsat comments in Docket No. 82-540, December 1, 1982 at 31-33. To the extent that ITT and WUI seek the unbundling of all Comsat earth stations as well, this matter is, as we will make clear, already under consideration in another ongoing proceeding.

[14] *See* 13 Wright, Miller and Cooper on Federal Practice and Procedure Section 3533 at 272-73: "With a possible exception for nominal damages, damage claims should never be moot."

[15] That section forbids, *inter alia*, unjust and unreasonable discrimination in the provision of like communication services.

[16] That section requires the Commission to insure that all present and future authorized carriers will have nondiscriminatory use of, and equitable access to, the communications satellite system and satellite terminal stations on just and reasonable terms.

22. Comsat replied to WUI's complaint and, as also noted above, the complaint was consolidated for hearing along with Comsat's applications. The ID stated that although Comsat's conduct was illegal and harmful to WUI,[17] the record did not support a finding that WUI would have won the bid had Comsat acted legally.[18] The ID thus rejected WUI's claim for monetary damages as being "too speculative."[19] In its Exception II., WUI claims that the ID applied the wrong legal test in denying WUI's claim for damages.[20] WUI claims that the ID erroneously required WUI to demonstrate that it would have won the bid had Comsat acted legally, and that the burden placed upon WUI, under the circumstances of this case, is impossible to meet because of Comsat's actions. WUI contends that the "burden of uncertainty"[21] should be upon Comsat.

23. The nature of WUI's Exception II. is unclear. To the extent that WUI contends that it was unlawful to have placed the burdens of proof and proceeding upon it in any event, we note that WUI relies upon *Bigelow* v. *RKO Radio Pictures*, 372 U.S. 251, 265 (1946) and *Equal Employment Opportunity Commission* v. *Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 923 (S.D.N.Y. 1976), *aff'd without opinion* 559 F.2d 1203 (2d Cir. 1977), *cert. denied* 434 U.S. 920 (1977).

24. *Bigelow* was a case where damages were awarded for violations of the Sherman and Clayton Acts, while in *Kallir, Phillips*, damages were awarded for violation of the Civil Rights Act of 1964. Whatever the standards for damages are under those Acts, however, it is beyond doubt that under both Title II of the Communications Act and its predecessor, the Interstate Commerce Act (ICA), damages are not presumed to flow from violations of the Acts. Under the ICA, the complainant has the burden of proving his damages. *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-455 (1979); *William N. Feinstein and Company* v. *United States*, 209 F. Supp. 620 (S.D.N.Y. 1962) *aff'd* 317 F.2d 509 (2d Cir. 1963).

25. The same is true under the Communications Act: a complainant must allege and prove specific damages flowing from violations of the Act. Thus, the court in *RCA Global Communications, Inc.* v. *Western Union Telegraph Company*, 521 F. Supp. 998 (S.D.N.Y. 1981) recognized that even though Western Union violated the Act by failing to file a tariff for its international communications service, RCA had to allege and prove damage flowing from a lack of a tariff before it could recover. See also *Edwards Industries* v. *Bell Telephone Company of Nevada*, et al., 74

[17] *See* ID at para. 58.

[18] *Id.*

[19] *Id.* at para. 61.

[20] WUI Exceptions at 12-14.

[21] WUI Exceptions at 13.

FCC 2d 322, 328 (1979), where this Commission held that the complainants were entitled to such damages as they could prove were "natural consequences" from defendants' violation of the Act.

26. This subject was also discussed at considerable length in *Thornell Barnes* v. *Illinois Bell Telephone Co*, 1 FCC 2d 1247 (Rev. Bd. 1965). That case said

> It is also well established that in a complaint proceeding, the complainant has the burden of proving both *the fact and the amount* of damages with the same degree of certainty as would be required to sustain a recovery in a court of law. (citations omitted, emphasis in original)
>
> The fact that a complainant has shown that a common carrier has, by certain acts or omissions, subjected itself to criminal prosecution or corrective proceedings by the Commission is not a basis for recovery of pecuniary damages without a showing of specific pecuniary injury. (citation omitted) Thus, the fact that a complainant establishes that a carrier discriminated against it does not, of itself, establish that it was damaged thereby. (citations omitted) The fact of damages resulting from a wrong must be proven with certainty. Although the amount of damages need not be established with precise mathematical accuracy, it must be shown with reasonable certainty and by the best means possible under the circumstances. (citations omitted).

Accord, Charles J. Gaetz, et al. v. *General Telephone Co of Pa.*, 49 FCC 2d 796 (1974); *Hughes Sports Network, Inc.* et al. v. *AT&T*, 25 FCC 2d 550 (Rev. Bd. 1970).

27. Thus, WUI must demonstrate that its failure to win the DoD bid and the return on investment associated with winning that bid were proximately caused by Comsat's allegedly unlawful conduct. *Southern Pacific Company* v. *Darnell-Taenzer Lumber Company* et al., 245 U.S. 531, 533-34 (1918). This it has failed to do. We note that WUI was the fourth lowest bidder for the Hickam-Guam service. Comsat Exhibit 2, Attachment 5; Tr. 637. We further note that DoD awarded the service based on minimizing cost to the Government and that WUI's bid was rejected on this basis. Comsat Exhibit 2 at Attachment 3; Tr. 669.

28. We also note that RCA was willing to accept almost no profit or even a loss in bidding for this service so that it could protect other circuits it provided from being cancelled or transferred to the 1.544 Megabit service. Tr. 760; RCA Exhibit 1A at 5 - 11. In other words, RCA had a very strong financial incentive to win this bid. One of its witnesses stated that the amount of return in its final bid was approximately $230. Tr. 760 (Muller). WUI, on the other hand, asks for damages based upon a return on investment plus associated income taxes of $74,864 annually plus interest. *See* WUI Exhibit 6. In fact RCA was the second lowest bidder and was considerably lower than WUI. This low bid was apparently based upon RCA's willingness to bid its own earth station and also to take a minimal profit on this service. ASC too bid its own earth stations, although there is no evidence in the record that it had any circuits to protect as RCA did. Under these circumstances, it is not surprising that

ASC was the next lowest bidder. DoD Exhibit 3; Comsat Exhibit 2, Attachment 5 *supra.* It seems to us that regardless of Comsat's behavior, the stiff price competition offered by RCA (and to some unknown extent by ASC,[22]) made it very unlikely that WUI would have won this DoD contract. This would appear to be the case even if Comsat had been willing to unbundle earth station from space segment charges for WUI since RCA would still have wanted to protect its existing circuits. Furthermore, it appears that RCA's bid was still lower than WUI's even if RCA had elected to use earth stations that were owned and operated by Comsat (RCA Option 2). *See* Comsat Exhibit 2, Attachment 5, Analysis of Five Year Discounted Life Cycle Cost; RCA Exhibit 1A at 15. In the absence of the Comsat bid,[23] RCA or perhaps ASC would almost certainly have won the contract.

29. Comsat's application to provide space segment service to ASC, which we officially notice, tends to confirm our analysis. Comsat there stated that DoD had rebid the Hickam-Finegayan service on a competitive basis to interested carriers, that Comsat itself did not bid on the RFP, and that ASC won.

30. Accordingly, WUI's complaint must be denied under *Thornell Barnes*, and the ALJ will be affirmed on this point. Even assuming Comsat's conduct was egregiously unlawful, there is no showing made by WUI that this conduct was the proximate cause of its failure to win the DoD contract and its consequent loss of the profits associated with this contract. WUI Exception II will therefore be denied.

Prospective Relief

31. As we stated above, except for the issue of potential damage liability to WUI by Comsat, any findings we might make concerning the reasonableness of Comsat's conduct would, in light of its motion to withdraw, be prospective in nature. However, ITT and WUI request that we find Comsat's bundling of space segment and earth station charges unlawful, apparently so that this finding may be used in other proceedings involving Comsat. *See* ITT Exception I.B. and WUI Exception III. As we pointed out above at para. 20, this issue appears moot because of Comsat's expressed willingness to unbundle space segment from earth station charges for this and similar services.

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[22] The record does not reveal the exact amount of ASC's bid although it does show that ASC was lower than WUI.

[23] WUI contended early that Comsat could not lawfully provide direct service to DoD. *See* WUI Petition to Dismiss or Deny, January 14, 1980 at 14-32. Presumably, therefore, a lawful bidding process would in WUI's view have excluded Comsat. We further note that no petitions to deny or comments were received on ASC's application to provide the Hickam-Guam service to DoD.

32. Nor do we think that this docket contains a sufficient record to enter a declaratory judgment that Comsat should unbundle space segment from earth stations in every circumstance.[24] The Commission has recently initiated a Notice of Inquiry requesting comments on a number of specific issues concerning the ownership and operation of earth stations as well as the tariffing of satellite services outside existing arrangements. *U.S. Earth Stations*, (Docket 82-540), 90 FCC 2d 1458, 1466-67, 1480-81 (1982). Comments and reply comments have been received from the public including most, if not all, of the participants in this docket,[25] and an order is anticipated in this docket in the near future.

33. Under these circumstances, we think it advisable to consider the question of whether Comsat should be required to unbundle all earth stations in Docket 82-540 rather than do so here. There may be peculiar circumstances associated with some types of earth stations which may not be present with other earth stations.[26] Since the events in this particular proceeding has been brought to the Commission's attention in Docket 82-540, the information elicited here could be useful to the Commission's determination in that docket.

34. At this point, the only exceptions which remain are those of ITT and Comsat. ITT Exceptions I. and II. essentially object to the ID's failure to find expressly that Comsat violated federal antitrust laws and to the ID's reliance upon a discrimination theory rather than upon the antitrust laws, as well as to the ID's alleged failure to consider expressly ITT's

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[24] *See Mechling, supra*, 330 U.S. at 331:

> Declaratory judgment is a remedy committed to judicial discretion. . . . We think that sound discretion withholds the remedy where it appears that a challenged "continuing practice" is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form-cannot confidently be predicted.

[25] WUI, for example, has pointed to Comsat's conduct in the present proceeding as one reason why Comsat should be required to unbundle earth stations from space segment. We take official notice that WUI's comments in that docket reference this proceeding. *See* WUI Comments in Docket 82-540 at 13-14, 15 n.*, December 1, 1982. We further note that Comsat has recently filed a proposal for restructuring earth station ownership and operating arrangements that would ultimately permit carriers to own and operate their own earth stations. *See* Comsat Motion to file a Proposal, June 23, 1983.

[26] For example, we asked in Docket 82-540 whether there was a need to maintain centralized control of all U.S. general purpose earth stations for purposes of coordinating their construction so as to operate efficiently with the INTELSAT system. We also asked whether Comsat should have a share in all general purpose earth stations. These considerations do not appear to be as important in the case of earth stations of the type at issue in this proceeding. Nor is the *AT&T* case, 87 FCC 2d 889 (1981), dispositive of whether Comsat must unbundle earth stations in every circumstance as some parties allege. *See* ITT Exceptions at 35-36. That case involved purely domestic communications over which the Commission has plenary power. We cannot force sovereign nations to communicate with earth stations they may not wish to communicate with. 80 FCC 2d at 179; 90 FCC 2d at 1475, 1479.

antitrust arguments. Comsat Exceptions II.A.-II.C., on the other hand, object to the ID's characterization of Comsat's behavior as unlawful. We think that ITT's and Comsat's exceptions on these points are not moot. *See* para. 46, *infra.* Even if they were not moot, however, we would, for the reasons discussed below, be forced to deny or dismiss ITT's exceptions.

35. As for ITT's claim in Exception I.B. that the ID erred by failing to hold expressly that Comsat committed unreasonable practices violative of the Communications Act and the Satellite Act, we do not understand ITT's objections. The ID expressly found at para. 61 that Comsat had violated the Communications Act and the Satellite Act.[27] Indeed, Comsat has excepted to those findings which ITT claims the ID failed to make. *See* Comsat Exception II. Thus, even if it were not moot, ITT Exception I.B. would have to be dismissed.

36. ITT also claims that the ALJ should have applied antitrust principles or, alternatively, that the ALJ erroneously viewed the Designation Order as limiting him to assessing only WUI's formal complaint or that the Commission's Designation Order erroneously excluded consideration of antitrust issues. We think that ITT fundamentally misperceives the nature of this proceeding and of the statutory role of this Commission under the Communications Act and the Communications Satellite Act by contending that this Commission must in effect assume the role of the Justice Department and the federal courts in acting on Comsat's applications and WUI's complaint.

37. The Commission's role in this proceeding is limited to the powers granted us by Congress under those Acts. Thus, we may, *inter alia,* approve or deny Comsat's applications and we may consider WUI's complaint for damages for violations of the Acts. And while the Commission is, as ITT notes, often obligated to consider questions of competition in its decisions, we may not further competition for competition's sake, *FCC* v. *RCA,* 346 U.S. 86 (1953). Moreover, as the court made clear in *United States* v. *FCC,* 652 F.2d 72 (D.C. Cir. 1980), which addressed the enforcement responsibilities of this Commission under the Clayton Act, a regulatory agency is not "strictly bound by the dictates of [the antitrust] laws." *Id.* at 88. Indeed, the court held that the require-

[27] The ID there stated

> Comsat has violated the Communications Act and the Communications Satellite Act by treating WUI differently from its other customer, DoD.

The ID also stated at para. 59 that

> Comsat's behavior was obviously illegal and harmful to WUI . . .

ments of Section 11 of the Clayton Act[28] and Section 309 of the Communications Act[29] "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs these consequences with other public interest factors." *Id.*

38. The court's analysis appears equally applicable to the Sherman Act. *Id.* at n. 76. ITT does not allege that the ID failed to consider the effects of Comsat's conduct on its putative competitors.[30] It objects primarily to the ID's failure to find expressly that this conduct violated the antitrust laws. We find that neither the ALJ nor the Commission was required to do more than the ALJ and the Commission have already done: the Commission asked that the ALJ determine the facts surrounding Comsat's responses to the other carriers, and the ALJ "seriously considered" the impact on those other carriers. ITT Exception I.A. would have to be denied for this reason. *See also FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978).

39. Exception II.B. is similar to I.A. In Exception II.B., ITT argues that the ALJ was required to apply antitrust principles *per se*, apparently in lieu of considering competition as one component of an overall public interest determination. It contends that Sections 102(c) and 201(c) of the Communications Satellite Act expressly required the ALJ to apply antitrust principles.[31]

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[28] That section provides, in relevant part, that

> Whenever the Commission or Board vested with jurisdiction thereof shall have any reason to believe that any person is violating or has violated any of the [enumerated] provisions . . . , it shall issue and serve upon such person and the Attorney General a complaint . . .

[29] Very briefly, this is the section of the Communications Act under which the Commission licenses the use of radio energy.

[30] The ID discussed this extensively at paras. 56-61.

[31] 47 U.S.C. Sections 702(c), 721(c)(1). Those sections provide, in pertinent part, that

> It is the intent of Congress that . . . maximum competition be maintained in the provision of equipment and services utilized by the system; that the corporation created under this Act be so organized and operated so as to maintain and strengthen competition in the provision of communication services to the public; and that the activities of the corporation created under this chapter and of the persons or companies participating in the ownership of the corporation shall be consistent with the Federal antitrust laws.

and

> [The FCC shall] insure effective competition, including the use of competitive bidding where appropriate, in the procurement by the corporation and communications common carriers of apparatus, equipment, and services required for the establishment and operation of the communications satellite system and satellite terminal stations . . .

40. There is nothing in the express language of Sections 102(c) and 201(c) of the Act which requires the Commission to become an antitrust enforcement agency. Nor does the requirement of compliance by Comsat with the antitrust laws in Section 102(c) mean that this Commission must assume the antitrust role of the Justice Department and the federal courts and exclude consideration of other public interest factors besides competition; such a role would be inconsistent with the Commission's normal statutory duty as interpreted by the courts to consider all aspects of the public interest in regulating common carriers. *U.S.* v. *FCC, supra.*

41. Section 401 of the Satellite Act does provide that wherever the application of the provisions of that Act would be inconsistent with the provisions of the Communications Act, the former must govern. What we must discern is whether Congress intended that the provisions of the Satellite Act cited by ITT, which speak in terms of maximizing competition and of compliance with the antitrust laws, override the broad public interest standards normally employed by the Commission.

42. The language concerning compliance with the antitrust laws in Section 102(c) to which ITT refers first appeared in H.R. 10040, 87th Cong., 2d Sess. (1962) after the bill was passed by the House. *See* S.Rep. No. 1584, 87th Cong., 2d Sess. (1962). That Report indicates that the language was added

> to dispel fears that were expressed that the legislation might be construed as exempting the corporation and the participants therein from the antitrust laws.

Id. at 13-14. We conclude that it was the clear intent of Congress that Comsat be subject to the antitrust laws. We agree with ITT that Comsat is obligated by statute to comply with those laws and violates them at its peril. However, this does not mean that this Commission is obligated, as ITT argues, to enforce the antitrust laws rather than consider antitrust policies as a public interest element, as it does in other regulatory contexts. ITT's interpretation would, as noted above, essentially cast this Commission in the role of the Justice Department and the federal courts. This would have been a marked change in the Commission's statutory duties as interpreted by the courts up till the time the Satellite Act was passed. *See United States* v. *RCA*, 358 U.S. 334, 346 (1959), where the Court said that the legislative history of the Communications Act revealed that the Commission was not given the power to decide antitrust issues as such. *Compare Seaboard Air Lines R.* v. *United States*, 382 U.S. 154 (1965).[32]

43. There is nothing in the legislative history of the Satellite Act showing that the Congress intended such a significant shift in the

[32] We note that Deputy Attorney General Nicholas Katzenbach believed that the congressional expression of intent that the corporation not be exempted from the antitrust laws would add nothing of substance. S. Rep. No. 1584, *supra* at 30.

Commission's responsibilities. It would be odd indeed for the Commission to be unable to decide antitrust questions as such under the Communications Act yet required to do so under the Satellite Act. Rather, it appears that the purpose of this language in Section 102(c) was simply to allow existing carriers to buy stock in the new corporation:

> Beyond permitting some presently competing entities to participate in the ownership of the corporation for this specific and limited purpose, H.R. 11040 stresses that the conduct of such entities must at all times be consistent with the antitrust laws.

108 Cong. Rec. 15867 (Remarks of Sen. Pastore). See also the remarks of Sen. Kefauver, 108 Cong. Rec. at 15855, quoting from the testimony of Judge Lee Loevinger, then Assistant Attorney General for Antitrust:

> Joint ownership of a communications system by competitors would raise serious antitrust problems, in my opinion, unless Congress provides for specific antitrust exception.

44. It is clear that Congress did not contemplate that the FCC would replace the Justice Department insofar as antitrust enforcement under the Satellite Act was concerned either:

> The bill does not depend on the FCC alone for enforcement of competition. . . .

108 Cong. Rec. at 15823 (Remarks of Sen. Pastore). See also Sen. Pastore's remarks at 108 Cong. Rec. 15818-15819. Accordingly, even if they were not moot, we would deny ITT's Exceptions on this point.

45. We also disagree with ITT's position that Section 201(c)(1) of the Satellite Act requires the FCC to enforce the antitrust laws as such. Although ITT quotes the words "insure effective competition" from the Satellite Act, it neglects to quote the relevant portion of Section 201(c)(1) in its entirety. Section 201(c)(1) states, in its entirety, that the Commission shall:

> insure effective competition, including the use of competitive bidding where appropriate, *in the procurement by the corporation and communications common carriers of apparatus, equipment, and services required for the establishment and operation of the communications satellite system and satellite terminal stations.*

(emphasis added). Section 201(c)(1) is not a general mandate that the Commission enforce the antitrust laws against Comsat, as ITT urges, but is aimed narrowly at ensuring effective competition in the market for equipment and services that would be purchased by the new corporation. The remarks of Rep. Harris at 108 Cong. Rec. 6933, where he responds to Rep. Celler's concerns that the new satellite corporation might favor its own manufacturing subsidiary, indicate that Section 201(c)(1) had just this

purpose.[33] Thus, we would deny ITT's Exception on this point as well if it were not moot.

46. Comsat has excepted to the ALJ's findings that Comsat violated the Communications Act and the Communications Satellite Act. We asked the ALJ to make findings on the reasonableness of Comsat's conduct in order to resolve the two overriding issues of this docket: what, in light of the ALJ's findings, was the proper disposition of Comsat's applications (issue (c)), and what damages WUI might be entitled to if Comsat had in fact acted unreasonably (issue (f)). The question of the reasonableness of Comsat's conduct is clearly moot insofar as it relates to what action should be taken on Comsat's applications. Moreover, because WUI has not demonstrated that any damages it suffered were approximately caused by Comsat's actions, there is not apparent reason to make findings in this proceeding as to whether Comsat's conduct was unreasonable for purposes of ruling on WUI's complaint. This is especially so because of the numerous other ongoing Commission proceedings involving issues that essentially underlie this particular proceeding.[34]

47. Accordingly, we will vacate that portion of the ALJ's decision finding Comsat's conduct to be unlawful. Comsat's exceptions on this point will be dismissed as moot.

48. Accordingly, IT IS ORDERED, That, the Complaint filed by Western Union International in CC Docket No. 81-356, File No. E-80-8, IS DENIED.

49. IT IS FURTHER ORDERED, That, the Initial Decision of the Administrative Law Judge finding that the Communications Satellite Corporation violated the Communications Act IS VACATED.

50. IT IS FURTHER ORDERED That, the exceptions filed by the Common Carrier Bureau, the Communications Satellite Corporation, the Hawaiian Telephone Company, ITT World Communications, Inc., RCA

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[33] See also S. Rep. No. 1584, *supra*, at 16:

> Paragraph [201(c)](1), as written in the bill when referred to your committee, required the Commission to insure effective competition in the procurement by the corporation of apparatus, equipment, and services, and to prescribe appropriate rules and regulations to this end.
>
> This paragraph has been amended to state specifically that the Commission may require competitive bidding, where appropriate, to achieve such competition.

[34] Some of these proceedings, such as Docket No. 82-540, were mentioned above. Others, such as Docket 82-548, the so-called "Direct Access" proceeding, (*INTELSAT Satellite Facilities*, 90 FCC 2d 1446 (1982)) were not. In the Direct Access proceeding, the Commission is seeking comment on new ways in which the IRCs might obtain access to INTELSAT, including the possibility of obtaining indefeasible rights of user (i.e. quasi-capital investment) in INTELSAT space segment. If the IRCs were allowed to obtain such access to Comsat, they might not need to obtain service from Comsat at all.

Global Communications, Inc., and Western Union International, Inc. ARE DISMISSED OR DENIED.

51. IT IS FURTHER ORDERED That, this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

FCC 81D-63

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of	
COMMUNICATIONS SATELLITE CORPORATION	CC Docket No. 81-353 File No. 391-CSG-P-80
For authority to construct a "Standard B" earth station antenna and associated facilities at Hickam, Hawaii, for use in the provision of 1.544 Mbps service, for operation with the INTELSAT system.	CC Docket No. 81-354 File No. 392-CSG-P-80
For authority to construct a "Standard B" earth station antenna and associated facilities at Finegayan, Guam, for use in the provision of 1.544 Mbps service, for operation with the INTELSAT satellite system.	CC Docket No. 81-355 File No. I-P-C-85
For authority under Section 214 to provide 1.544 Mbps service through two "Standard B" INTELSAT earth stations located at Hickam, Hawaii, and Finegayan, Guam, and for operation with the INTELSAT satellite system and,	
In the Matter of	
WESTERN UNION INTERNATIONAL, INC.	CC Docket No. 81-356 File No. E-80-8
Complainant	
v.	
COMMUNICATIONS SATELLITE CORPORATION	
Defendant	

Appearances

Lawrence M. DeVore, Daniel J. Harrold, Barry M. Heller and *Sally Katzen* on behalf of the applicant and defendant Communications Satellite Corporation; *Marc N. Epstein* and *John M. Scorce* on behalf of the complainant Western Union International, Inc.; *J. Randolph MacPherson* on behalf of the intervenor Defense Communications Agency for the Secretary of Defense; *Theodore J. Fischkin* and *Susan I. Littman* on behalf of the intervenor ITT World Communications, Inc.; *Robert F. Heath* on behalf of the intervenor RCA Global Communications, Inc.; *Daniel J. Greenwald, III* and *Thomas J. O'Reilly* on behalf of the intervenor Hawaiian Telephone Company; and *Susan S. Balk, Paul B. Froyd* and *Giovanna M. Longo* on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: December 4, 1981; Released: December 10, 1981

1. On May 29, 1981, the Commission designated the following issues for determination in an evidentiary hearing (*Order Designating Application for Hearing and Granting Section 319(d) Waiver*, 86 F.C.C. 2d 712, 716-18):

(a) Whether the construction of the Hickam and Finegayan earth stations at ratepayer expense is required by the public interest, convenience and necessity within the meaning of Section 309 of the Communications Act and Sections 201(c)(7), 201(c)(9) and 201(c)(10) of the Communications Satellite Act of 1962. Included in the determination shall be:

(1) whether the existing commercial earth station at Pulantat, Guam, is likely to be utilized in an efficient and profitable manner; and

(2) whether the efficient utilization of the proposed facilities would necessitate future diversions of circuits from the Pulantat facility.

(b) Whether the rate proposed by Comsat represents a just and reasonable charge for the proposed service within the meaning of Section 201 of the Communications Act, such that the total facility costs are borne solely by the users of this facility, and if not, what rate, if any, should be prescribed under Section 205 of the Communications Act. In this regard Comsat must also show:

(1) whether DOD and other U.S. Government agencies will utilize the proposed facilities at full capacity according to Comsat's five-year projection; and

(2) whether Comsat's allocation of total costs among the users is just and reasonable.

(c) In light of the evidence adduced pursuant to the foregoing issues, what disposition of the above-referenced applications would best serve the public interest, convenience, and necessity.

(d) The facts and circumstances concerning Comsat's response to rate and service data requests from Western Union International, Inc. for earth stations and 1.544 Mbps service between such stations at Hickam AFB, Hawaii and Finegayan Naval Base, Guam.

(e) In light of the findings under issue (d), whether Comsat's actions violated Sections 201(b), 202(a) of the Communications Act of 1934, as amended or Section 201(c) (2) of the Communications Satellite Act of 1962.

(f) If under issue (e), Comsat is found to have violated Sections 201(b), 202(a) of the Communications Act of 1934, as amended or Section 201(c)(2) of the Communications Satellite Act of 1962, whether and to what extent Comsat may be liable to Western Union International, Inc. for damages.

2. The Commission also directed that the presiding administrative law judge issue an initial decision within six months of the release of the designation order. In order to comply with the Commission's directive the issues were heard on an expedited schedule. A prehearing conference was held on July 1, 1981. On July 24, 1981, August 19, 1981, and September 4, 1981, the parties made three filings of written testimony. Cross-examination of the witnesses who had provided written testimony took place during the week of September 14-18, 1981, at which time the record was closed (subject to the receipt of a stipulation as to certain matters raised during the hearing). On October 9, 1981 all of the parties filed proposed findings of fact and conclusions of law and on October 23, 1981, replies.

Findings of Fact

A. *Impact of the New Dedicated Commercial Service on Existing Commercial Service*

3. On November 16, 1979, the Communications Satellite Corporation (Comsat) requested authority from the Commission to construct at Hickam Air Force Base, Hawaii and Finegayan Naval Base, Guam two "Standard B" international earth stations and associated facilities. The earth stations would be operated through the INTELSAT satellite system and would provide 1.544 Mbps service to the United States Department of Defense (DOD) as an authorized user. The proposed service is part of DOD's plan to establish "dedicated" military base-to-military base commercial satellite links. DOD Exh. 2, p. 2. DOD would like the base-to-base system because, in its view, Standard B earth stations would achieve cost savings and would provide route diversity and redundancy by adding another transmission link to its existing communications service. *Id.* Currently, between Hawaii and Guam, DOD has available and uses military satellite, commercial satellite, and commercial cable. *Id.* The new transmission link would be encrypted and because the earth stations would be located on military bases which are secured by military police, DOD believes that they would be more secure and less vulnerable to

military attack. *Id.* The currently available military satellite system already meets these criteria. Tr. 699; DOD Exh. 2, p. 7.

4. DOD would like the service to be extended to Yokota Air Base, Japan but Japan has not authorized the Standard B earth station; in fact, although DOD would like commercial Standard B earth stations on bases in Germany, Spain, and the United Kingdom and has thought about having them in Korea, Okinawa and the Philippines, no foreign government has authorized one. DOD Exh. 2, pp. 5-6, 9.

5. Comsat and the Common Carrier Bureau believe that current customers would not discontinue using the existing commercial earth stations on Hawaii and Guam because the proposed service through Standard B earth stations would be more costly. Comsat Exh. 1, pp. 7, 9; Tr. 918-19. DOD would use the "most economic alternative available." DOD Exh. 8.

6. Even if commercial Standard B earth stations are established on military bases, DOD would continue to route twenty-two satellite half circuits through the existing commercial station at Pulantat, Guam. CCB Exh. 3; DOD Exh. 2, p. 7. These DOD circuits are primarily those going to Japan and the Philippines. DOD Exh. 2, p. 7. However, all satellite circuits destined only for Guam from Hawaii would use the proposed 1.544 Mbps satellite link. DOD Exh. 2, pp. 7-8. DOD intends that the four half circuits which used the existing Pulantat earth station, and now use marine cable, and four half circuits initiated in November 1980, which also now use marine cable to Guam, would be rerouted through the proposed Standard B earth stations. DOD Exh. 2, p. 9.[1]

B. *The Rates For the New Service*

7. The parties are in agreement that traffic forecasts underlying the proposed rates for the new service should reflect reasonably anticipated demand. Tr. 122-23, 127, 427-29, 841-45; DOD Exh. 4, p. 15.

8. Comsat forecasts a demand for 21 half circuits as follows: seven to be provided to DOD for 1.544 Mbps service (Comsat Exh. 7, pp. 2-33); four to be provided to the Air Force Satellite Control Facilities Service (AFSCFS), a category of Air Force Digital Services or AFDIGS (Comsat Exh. 7, pp. 3-5; Tr. 337-38); six to be provided to the Air Force Radio and Television Services (AFRTS) (Comsat Exh. 7, pp. 5-6); two to be provided for video conferencing (Comsat Exh. 7, p. 7; Tr. 337-38); and two to be developed through stimulation or by availability of the base-to-base

[1] Dr. Boyd Nelson, the Common Carrier Bureau's economic witness, noted that insofar as the special features required by national security are not available at the existing Guam earth station at Pulantat, the services are nonduplicative. "But if it is contemplated that traffic not requiring the unique national security features of Finegayan is also to be carried at that location, then it may be concluded that traffic is being diverted from Pulantat." CCB Exh. 1, p. 10.

system which Comsat assumes would be used by the government (Comsat Exh. 7, pp. 6-7).

9. Comsat has no plan to file a tariff for the other services it forecasts until the requirements develop. Tr. 188, 193-95. On September 25, 1979, Joseph Wellington, Comsat's manager of rates, tariffs and pricing for international communications, indicated in an internal Comsat memorandum on various pricing methodologies that a forecast of twenty channels "appears unrealistic." CCB Exh. 12. Although in another memorandum written on January 18, 1980, Mr. Wellington indicated that it is "Comsat's belief that once these stations are operable significant traffic will materialize, particularly given the present day sensitive international political situation . . .." WUI Exh. 2, p. 3.

10. The request for proposal (RFP) issued by the Department of Defense, however, requires only three half circuits: One half circuit from Hickam, Hawaii to the satellite, one from Finegayan, Guam to the satellite, and an optional half circuit from Hickam to the satellite to link Japan. Comsat Exh. 1, p. 3. The optional half circuit would be usable only if the Japanese agree to a Standard B earth station on the Yokota Air Base. Tr. 705-06.

11. Comsat's basis for four of the remaining half circuits projected for DOD is a September 21, 1978 letter from United States Air Force Colonel Eugene Morris, Chief, Commercial Communications Policy Office, Defense Communications Agency, to George Lawler of Comsat. Comsat Exh. 7, Attach. 1, p. 1. Colonel Morris in his letter, after explaining the savings and security that would result from 1.544 Mbps services, stated that the Department of Defense had "tentative plans for future 1.544 Mbps services." *Id.* Comsat included in its projection of demand Morris' plan for one half circuit from Hickam Air Force Base, Hawaii to McClellan Air Force Base, California. However, this half circuit was awarded to Western Union International in March 1979 and it is not, therefore, a possibility. WUI Exh. 6, pp. 3-4. Two other circuits projected by Comsat from the Morris letter would be between Hawaii and the Philippines and Guam and the Philippines. Comsat Exh. 7, Attach. 1. The remaining circuit projected from the Morris letter would be between Guam and japan. *Id.*

12. While the original Morris letter did not specify which earth stations would be used by DOD for these circuits, Comsat's director of marketing and sales, David Gourley, stated that he assumed that the proposed commercial Standard B earth stations would be used. Mr. Gourley stated that the basis for his view was "informal discussions" Mr. Simms of his staff had with DOD. Tr. 344-47. There is no written record or memo of the discussions. Tr. 346.

13. When DOD provided a current projection for 1.544 Mbps commercial satellite service for this proceeding, it stated that Standard B earth

stations were required, but that the Hickam Air Force Base and Finegayan Naval Base earth stations would be used only if they were the "most economic alternative." DOD Exh. 8. DOD's plans for the 1.544 Mbps services have already changed. The September 1978 Morris letter stated that it was DOD's plan to lease the Hawaii-Guam, Hawaii-Philippines and Hawaii-Japan links as a single system to provide 1.544 Mbps services. Comsat Exh. 7, Attach. 1. But the proposal to which Comsat responded did not include the Hawaii-Philippines link. The Morris letter, which was sent to all of the international carriers to apprise them of DOD's plans, clearly stated that the circuits indicated might be changed without advance notice. *Id.* Its tentative nature is underscored by the fact that it was not until recently that DOD initiated a study of the feasibility of 1.544 Mbps satellite links between Hawaii and the Philippines, Hawaii and Korea and Hawaii and Okinawa. CCB Exh. 3, p. 2. In fact, in November 1978, C. W. Simms, Assistant Director of Sales for Comsat, concluded that the September 1978 letter of Colonel Morris "may no longer be valid for forecasting demand." Tr. 287; CCB Exh. 14, pp. 4-5. Mr. Simms had held informal discussions with DOD about the demand for 1.544 Mbps services. CCB Exh. 21; Tr. 310. Moreover, Comsat acknowledges that since commercial satellite service is available at less cost, there is no incentive for other users to route their communications through the proposed earth stations. Comsat Exh. 1, pp. 7, 9. DOD stated that it did not know of any other customer which would have the special requirements it has for 1.544 Mbps coded service. CCB Exh. 2. There is no existing plan by any potential customer for the remaining fourteen half circuits projected. Tr. 348-50, 355, 357, 358; CCB Exh. 3.

14. The remaining fourteen half circuits, which are not projected in the Morris letter and which Comsat believes will develop, have no known requirement for encryption and secure earth stations on military bases. Comsat Exh. 8, p. 1; Tr. 347-48, 358-60. For example, there is no plan by the Air Force Satellite Control Facilities Service, a category of the Air Force Digital Service, for the four half circuits Comsat projects to be transmitted through the Hickam-Finegayan earth stations. CCB Exh. 3, p. 4.[2] While DOD in May and June of 1979 sought bids for such a service, Comsat did not bid to provide it. Tr. 332-33; Comsat Exh. 7, pp. 3-4.

15. The six half circuits forecasted for the Air Force Radio and Television network are also not now the subject of any proposal, although

[2] In response to interrogatories in this proceeding, DOD stated that "AFDIGS circuits have not been specifically planned for nor precluded from provision over the Hawaii-Guam 1.544 Mbps system." *Id.* In this regard, it should also be noted that DOD requires that AFSCF service be provided through earth stations that are compatible with the Defense Satellite Communications System. Comsat Exh. 7, Attach. 3, p. 4. However, DSCS and the Comsat proposed earth stations are not compatible, and there can be no communications between them. Tr. 709.

one has been made for the Atlantic. Tr. 303, 306, 355. Comsat has had informal discussions with the Air Force network and they have indicated a desire for satellite service in the Pacific, but not necessarily out of the proposed facilities. Moreover, these discussions do not reflect an actual Air Force Plan for Pacific service. Tr. 303-06. While the Hickam-Finegayan earth stations are "capable of providing television service" (Comsat Exh. 7, pp. 5-6), the INTELSAT satellite to which it has been assigned makes it impossible for the AFRTS service to use Hickam or Finegayan earth stations. Comsat Exh. 8, p. 1. Moreover, the likelihood of initiating such service to Guam and Hawaii is less likely than in other areas because both areas already have substantial American commercial television service. Tr. 799-801.

16. The two half circuits forecasted for use in video conferences were based on Comsat's view that use of video conferences will grow and that such a service will be stimulated by the proposed service. Comsat Exh. 7, p. 7; Tr. 356-57. Comsat believes the United States Government will be the customer for video conferences, but there are no existing government plans for using the service. Tr. 348-50, 357. Comsat has discussed the benefits of video conferences with military but not with civilian government agencies. *Id.*

17. Comsat also believes that GSA and the State Department might use two half circuits because they have international communications requirements. Tr. 337-38, 358. Neither the State Department nor GSA have indicated any requirement to Comsat for service from the proposed earth stations. Tr. 358. GSA has, however, indicated to DOD that it would use four satellite voice circuits out of the proposed facilities. CCB Exh. 3. But each 1.544 Mbps half circuit has twenty-four satellite voice circuits, which leaves forty-four voice circuits unused. Comsat Exh. 5, pp. 4-5.

18. Testing and developing forecasts of future traffic for the proposed facilities is not easy since there are not historical or analogous data. Tr. 845-46, 848-50. This is due to the very special national security design of the proposed service. *Id.*

19. Comsat's proposed rate for the Hickam and Finegayan service is $45,450 per half circuit month. Comsat Exh. 5, p. 8. Comsat attributes $37,520 of the proposed per half circuit month rate to the space segment revenue requirement and $7,927 to ground segment revenue requirement. *Id.* The ground segment fixed costs per half circuit would be $5,104 and the variable costs per half circuit would be $2,823. Comsat Exh. 5, Attach. 2, pp. 3-4.

20. In allocating the per circuit month fixed costs for the ground segment, Comsat allocated one-third to DOD's RFP circuit requirement and then divided that over the five year life of the service (366 half circuit-months). Comsat Exh. 5, pp. 6-7, Attach. 2, p. 3. Comsat derived the one-

third allocation from its market forecast that assumes that seven of the twenty-one projected half circuits would be billed to DOD. Comsat Exh. 5, p. 6. Comsat assumes that DOD's seven half circuits would provide $1,799,865 of the total $5,429,596 ground segment fixed cost revenue requirement. Comsat Exh. 5, Attach 2, p. 3. Recovery of the remaining fixed costs for the ground segment is dependent on the additional customers which Comsat forecasts.

21. Dr. Boyd Nelson, who testified for the Common Carrier Bureau, stated that conventional ratemaking requires that allocation of the cost of a service should be made fully to those units of service which can be expected.[3] Tr. 843. It is Dr. Nelson's view that Comsat's allocation of one-third of the fixed costs to DOD does not fully cover the revenue requirements for the service. CCB Exh. 1, pp. 3-4; Tr. 841-42. He believes that Comsat assumes an unreasonable demand and therefore the revenue derived from the Finegayan-Hickam service will not be as great as the cost of providing the service. In making this argument, Dr. Nelson pointed out that projecting demand for the service proposed here is a "very difficult, haphazard one" because of the limitations on possible customers where military base-to-base earth stations are dedicated solely to United States Government users. Tr. 181, 186-87, 850.

22. For example, Dr. Nelson reviewed the circuit growth on the existing Standard A earth station on Guam at Pulantat. He found that at the end of 1975 there were 76 equivalent voice grade circuits, with a subsequent decline each half-year to 54 in mid-1977. After mid-1977 the number of circuits began to grow until by the end of 1980 there were 121 circuits in use. CCB Exh. 1, pp. 15-16. He urges that this pattern indicates that it is unreasonable for Comsat to assume that the Finegayan-Hickam service could reach 168 circuits in the third year of service. Dr. Nelson also pointed out that in 1980 the Pulantat service was nearing the end of its service life with 84% of its investment cost already written off. When this fact is considered, it is even more unreasonable "to expect that 168 circuits would represent only ⅓ of the total" circuits in use. *Id.* at 16. Comsat's assumption that three times this number of circuits could be achieved in the third, fourth, and fifth year, he concluded was even more improbable.

23. The Common Carrier Bureau pointed out that other Comsat ratepayers could make up the difference because Comsat has for a

[3] There is agreement among the parties that rates for service should reflect the full cost of providing the service, absent a very compelling reason. See Testimony of Goldstein, Tr. 127; Gourley, Comsat Exh. 8, pp. 2-3; Wellington, Tr. 216-17, 242; Nelson, CCB Exh. 1, p. 3; Tr. 838-39. In addition, there is general agreement among the parties that before establishing a rate structure, it is necessary to determine the revenue requirement for the service.

considerable period had earnings in excess of its prescribed 11.48 to 12.48 percent rate of return. CCB Exh. 1, p. 4. The Bureau, citing Comsat's Form 901, noted that Comsat's rate of return in 1978 was 14 percent, in 1979 17 percent, and in 1980 more than 21 percent. CCB Exh. 1, p. 5. Comsat stated that any shortfall of revenue would be made up by other Comsat ratepayers. Comsat Exh. 8, pp. 2-3.

24. Once Comsat derived the ground segment fixed costs portion of its proposed rate, it applied a "present value factor." That is "[i]n order to recognize . . . the time value of money (. . . to state future costs in current dollars), both future revenue requirements and market demand were discounted to their present value based on an 11.48% discount rate over five years." Comsat Exh. 5, pp. 7-8.[4] The interest rate used in the computation is the lower end of Comsat's permissible rate of return. Tr. 246.

25. Comsat assumed that the present value of its return on its investment would need to be discounted in the first year of the service by 0.897. The discounted value of $79,853 in revenue, depreciation and taxes received would be $71,628. Joseph Wellington, Comsat's manager of rates, explained, "[I]t comes up to a higher rate than you would otherwise have if you didn't apply the present value factor . . .." Tr. 847. This was used, he testified, because Comsat provides the money in the first year of the service and it gives recognition to the value of that money Comsat does not get back in the first year. Tr. 248. However, Comsat could not and did not explain why the use of the present value factor was an

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4 *GROUND SEGMENT VARIABLE COSTS*

	Year 1	*Year 2*	*Year 3*	*Year 4*	*Year 5*	*Total*
Revenue Requirements:						
Depreciation						
Return and Taxes						
Total	$79,853	72,058	65,569	59,874	54,584	
P.V. Factor	0.897	0.805	0.722	0.647	0.581	
Net Present Value	71,628	58,007	47,341	38,738	31,713	$247,427
Circuit Months	24	24	24	24	24	
P.V. Factor	0.897	0.805	0.722	0.647	0.581	
Net Present Value	21.528	19.32	17.328	15.528	13.944	87.65

Variable cost component for 1.544 MBS/S circuit rate =

$$\frac{247,427}{87.65} = \$2,823$$

acceptable element in establishing a rate. Moreover, Mr. Wellington, who developed the rates for Comsat, stated that while present factors attempt to determine the value in current dollars of future dollars, by discounting the future dollars at an assumed compounded interest rate, the concept was "used possibly a little differently" in his revenue requirement calculations. Tr. 244. Comsat provided no explanation why such a theory was applied to the return of dollars in the year in which they are invested (Tr. 247-49), or how present value factoring to develop rates recovers the revenue requirement of the service. Tr. 247. Comsat did explain that it believed that by discounting both the traffic and book investment they were still rendered "comparable." Tr. 267-68.

26. Dr. Boyd Nelson pointed out that if Comsat's anticipated service of 366 circuit-months over a five year period actually occurred, the ground segment charge per circuit-month would return $759,479 more than the total revenue requirement estimated for that period. CCB Exh. 1, p. 14. The discrepancy arises, he states, because Comsat included the basic 24 circuit-months of 1.544 Mbps service twice in the calculations of cost per circuit-month, once in the fixed cost calculation and again in the variable cost calculation. *Id.* Dr. Nelson also found there has been an inappropriate averaging of the resulting unit cost figures by Comsat. *Id.* This technique, he urges, enables the carrier to project a relatively low revenue requirement, but recover considerably more than that revenue require-

GROUND SEGMENT FIXED COSTS

Average Net Investment	*Year 1*	*Year 2*	*Year 3*	*Year 4*	*Year 5*	*Total*
Revenue Requirements:						
Depreciation						
O&M						
Return & Taxes						
Total	1,090,603	1,007,242	1,076,489	1,085,005	1,100,257	
Allocation to 1.544 MBS/S						
Service	363,534	359,081	358,830	351,668	366,752	
P.V. Factor	0.897	0.805	0.722	0.647	0.581	
Net Present Value	326,090	298,060	259,075	233,999	213,083	1,321,307
Circuit Months	36	78	84	84	84	
P.V. Factor	0.897	0.805	0.722	0.647	0.581	
Net Present Value	32.29	62.79	60.65	54.35	48.80	258.88

Fixed cost component for 1.544 MBS/S circuit rate = $\frac{1,321,307}{258.88}$ = $5,104

ment. *Id.* at p. 15.[5]

27. ITT and WUI criticize Comsat's claimed space segment per half circuit revenue requirement because it is 86 percent greater than the per half circuit utilization charge Comsat pays INTELSAT. ITT Exh. 1, p. 10; WUI Exh. 6, p. 11; WUI Exh. 7, pp. 4-5. These parties do not identify what portion of the 86 percent is profit and they generally agreed with Comsat that at least part of 86 percent represented additional expenses Comsat incurs. Tr. 624, 726, 730-37. Comsat represents that in addition to the utilization charge there are taxes, research and administrative costs and other overhead, investment in and related to space segment facilities and marketing. Comsat Exh. 5, pp. 2-4. Initially Comsat's revenue requirement was allocated two-thirds to the space segment cost of the service and one-third to the earth segment. Comsat Exh. 5, pp. 4-5. There is no record evidence that accounts for the allocation. In 1979 Comsat attributed 72% to space and in 1980 74%. Comsat Exh. 6, pp. 5-6; Comsat Exh. 6A.

28. The space segment rate of $1,340 per half circuit used by Comsat has since been reduced to $1,125. Therefore, the claimed revenue

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[5] Dr. Nelson illustrated this proposition by considering a one-year period of service, with a demand of 36 circuit-months in total, 24 of these being the equivalent to the basic two 1.544 Mbps half circuits which are assigned the variable costs. Dr. Nelson testified that "a weighted average of the fixed cost per circuit-month would amount to (F+V)/36 . . .. [M]ultiplying this unit charge by 36 units would equal (F+V). However, Comsat's technique yielded (F+1.5V). Accordingly, Comsat's proposed rate structure is faulty." *Id.* at 15.

requirement of $37,520 per half circuit for the service has declined to $31,500. Tr. 225-26, 923.

29. Dr. Nelson urged that all the ground segment fixed charges should be assigned to the 1.544 Mbps service. CCB Exh. 1, p. 16. To account for the uncertainties of demand he proposes "an approximately hyperbolic rate curve" which uses the total ground segment fixed and variable costs and space segment costs as developed by Comsat. *Id.* The proposed rates are based on a total ground segment revenue requirement of $5,761,534 for the five year service period. *Id.* Sharing among users is assumed. *Id.* Dr. Nelson's proposal is as follows:

Proposed Rate Structure
Hickam-Finegayan Service

Total Demand Quantity [A] *(Circuit-months per year)*		*Charge per Circuit-Month* [B] *(dollars)*			
24 or less		$48,013	(ground segment)	+ 37,520	(space segment)
more than 24	and under 30	$42,985	"	+ 37,520	"
" 30	and under 36	35,673	"	+ 37,520	"
" 36	and under 42	30,610	"	+ 37,520	"
" 42	and under 48	26,898	"	+ 37,520	"
" 48	and under 54	24,059	"	+ 37,520	"
" 54	and under 60	21,817	"	+ 37,520	"
" 60	and under 66	20,003	"	+ 37,520	"
" 66	and under 72	18,504	"	+ 37,520	"
" 72	and under 78	17,245	"	+ 37,520	"
" 78	and under 84	16,173	"	+ 37,520	"

[A] For all customers combined.

[B] The "Charge per Circuit-Month" figures in CCB Exh. 1, p. 18, consist of a space segment component ($37,520) added to ground segment component. The ground segment component was developed by dividing the annual ground segment revenue requirement (or $\frac{5,429,596 + 331,938}{5}$ = 1,152,307) by the total number of half circuit-months taken by all customers during the year (represented by the half circuit-months at the midpoint of each interval, i.e., 24, 27, 33, etc.) The "Charge per Circuit-Month" figures in Exh. 1B were developed with the same methodology, except that the variable cost for each interval was computed by multiplying the per half circuit per month variable cost ($2,766.15) by the number of half circuit-months in the interval. CCB Exh. 1B.

30. The proposed rate structure is infinitely expandable. Tr. 927-28. Each customer pays the same rate per unit of service in each year, the rate for each year determined by the total level of usage. CCB Exh. 1, p. 18; CCB Exh. 1B; Tr. 932-33, 955. Dr. Nelson urges that his proposed rate structure provides for payment for service actually used and gives users the benefit of quantity purchase discounts, without regulatory lag. CCB

Exh. 1, p. 17; Tr. 927. Dr. Nelson listed the additional advantages of his proposal:

(a) Eliminating the imposition of a cross-subsidy on the Comsat general ratepayer,

(b) Providing incentives for increased usage and efficiency,

(c) Recovering the revenue requirement of the proposed service, despite the unlikely prospect of future usage beyond the three reasonably expected DOD 1.544 Mbps services, and

(d) Preventing discrimination among user. CCB Exh. 1, p. 17; Tr. 874-75, 926-27.

31. Comsat has objected to this proposal because it believes that it would present the same problems of discrimination as a block rate and billing problems. Comsat Exh. 6, pp. 4-5; Tr. 258-59. Comsat's Wellington likened the proposal to a block rate where each customer pays a different rate depending on which block or use level the customer reached. Comsat Exh. 6, pp. 4-5. The Common Carrier Bureau pointed out that this was a misunderstanding of the Nelson proposal which extends the lower unit rates of increased usage to all customers. CCB Exh. 1, p. 18, n. 2; CCB Exh. 1B, n. 2; Tr. 995.

32. Mr. Wellington also criticized the Nelson rate structure because he believed that if the rates change every month it would be difficult to administer. Comsat Exh. 6, pp. 4-5; Tr. 258-59. The Common Carrier Bureau explained that Dr. Nelson's proposed rate structure does not require that result. It pointed out that it would be necessary only for all customers to indicate their expected usage for the coming year at the beginning of the year, the appropriate single rate per unit of service for the year would be selected, and each customer would be billed for its expected level of usage, and the customer would pay for service on a schedule chosen by Comsat. Tr. 939-40. Dr. Nelson explained that if the actual circuit-months used during the year differed from the total expected circuit-months, the rates could be trued on an annual, semiannual or quarterly basis by Comsat. Tr. 940-41. He maintained that in a service such as the one proposed, it is unlikely that reconfiguration of the bill would be necessary during the year. Tr. 939-40. He pointed out that Comsat need only select the desired interval before the rate need be adjusted and the schedule of payments it would prefer as terms and conditions of the tariff.

33. DOD witness Roger Peterson proposed that the appropriate remedy to protect the Comsat general ratepayers from cross-subsidy would be to require that Comsat separately account for the investment, expenses and revenues of the proposed service (DOD Exh. 4, pp. 11-12), and that if there is evidence of a cross-subsidy, the Commission could then investigate the matter. Tr. 1015. Mr. Peterson acknowledged that separate accounting would do nothing more than indicate whether a cross-

subsidy exists, and would not protect Comsat ratepayers from the effects of cross-subsidy. Tr. 1022.

C. *Western Union International's Complaint*

34. Comsat's actions during the Department of Defense bidding process are the subject of a complaint filed by Western Union International. On December 18, 1978, the Defense Communications Agency (DCA) through the Defense Commercial Communications Office (DECCO) issued a request for proposals, for 1.544 Mbps service. DOD Exh. 1, Attach. 1. The initial request required that the system be installed on Hickam AFB, Hawaii, Finegayan Naval Base, Guam and Yokota AFB, Japan. RCAG Exh. 1A, Attach. 1. DOD wanted the service bulk encrypted. In addition, it stated that it would select the carrier on the basis of the lowest cost based on "the total discounted life cycle cost over a five year period." RCAG Exh. 1A, Attach. 1, p. 6. The Hickam-Finegayan service was to begin on July 16, 1979. In order to submit a response to the DOD request, WUI, or any other U. S. carrier, must obtain satellite circuitry from Comsat, which is the United States member in the international satellite consortium, INTELSAT. WUI Exh. 3, p. 2; Comsat Exh. 2, pp. 1-2.

35. WUI asked Comsat for charges for the proposed service under three different conditions: (1) using the existing INTELSAT earth stations at Hawaii, Guam, and Japan; (2) constructing new Standard B earth station at Hickam; and (3) providing only the space segment from a Standard B earth station. WUI Exh. 3, Attach. H, p. 1. On March 28, 1979, Comsat responded and quoted a price of $34,500 per half circuit, if existing facilities were used, and $85,000 per half circuit, if Standard B earth stations were constructed. WUI Exh. 3, p. 6.

36. The quote of $85,000 for Standard B earth stations was based solely on the number of circuits sought by DOD in its RFP. WUI and RCAG, ITT, and American Satellite Corporation submitted bids using the lower quote. This bid assumed the use of the existing earth stations. Comsat did not bid because the services were going to be provided through existing facilities. CCB Exh. 14, p. 2.

37. However, after evaluating the carriers' proposals, DOD changed its requirements and asked for bids that would provide Standard B earth terminals at Hickam AFB, Hawaii, and Finegayan Naval Base, Guam. DOD Exh. 1, p. 3. When the bid specifications were changed, Comsat believed that the carriers would construct their own earth terminals and access "INTELSAT directly and bypass COMSAT totally." CCB Exh. 14, p. 2. Faced with this possibility Comsat decided to reconsider whether it ought to bid. *Id.* Indeed, when Comsat talked with Charles Potratz, the official in charge of the bidding at DOD about the change in the

specifications, Mr. Potratz indicated that DOD wanted Comsat to apply. CCB Exh. 18.

38. On May 17, 1979, WUI requested another rate quotation from Comsat using Comsat provided Standard B earth stations at Hickam and Finegayan; it also sought a separate quote for the space segment only between Hickam and Finegayan. WUI Exh. 3, pp. 7-8. On June 1, 1979, Comsat responded that the price would be $91,600 per half circuit per month; this rate included both the space and earth segments of the circuit. WUI Exh. 3, p. 8. Comsat also explained that it "does not provide space segment only quotations for service," but it did identify for WUI that $37,520 of the rate quoted represented the space segment charge for a half circuit per month for the 1.544 Mbps service. *Id.*

39. Comsat decided to bid. However, when it developed a rate for its own bid, it quoted to DOD $65,900 per half circuit per month. WUI Exh. 3, Exh. D, p. 13. The day after submitting its bid, Comsat decided to look at what the costs would be if it provided DOD three circuits, instead of two. CCB Exh. 19. Comsat preliminarily concluded that the additional circuit would increase the overall costs but reduce the per half circuit price to $57,900; on June 7, 1979, following this preliminary determination Comsat filed a new bid with DOD using the lower figure. WUI Exh. 3, Exh. D, p. 3. It was not until June 11, 1979 that these newly bid rates were internally confirmed by Comsat's ratemaking staff. WUI Exh. 6, Exh. I.

40. Several additional amendments were then made by DOD to the RFP: On July 11, 1979 DOD asked the carriers for a one year price option for an additional half circuit to Japan. CCB Exh. 23. For this half circuit Comsat quoted to WUI a price of $42,400 and to DOD a price of $57,900. CCB Exhs. 27 and 29. In September 1979 DOD requested that the carriers submit their best and final offers. On September 13, 1979, WUI asked Comsat for its most recent price and Comsat responded that the price per half circuit per month would be $91,425 and $42,225 per month for the optional circuit to Japan. WUI Exh. 3, Exh. H-9. However when Comsat bid, its rate to DOD was $45,450 per half circuit. WUI Exh. 3, Exh. F.

41. Comsat excuses this variance in rates by urging that the rate bid to DOD was based on its own forecast of possible customers for the service. Comsat Exh. 1, p. 9; Tr. 265-66. Comsat was aware that its circuit forecast beyond that required by the DOD RFP would enable Comsat to submit a more competitive proposal. Tr. 294. As early as July 1979 Comsat's marketing department indicated that to win the bid, it would have to offer the service to DOD for $55,000 per month per half circuit. CCB Exh. 28, p. 3. Following that view, and in response to RFP amendment seven, Comsat bid in July $57,000 per half circuit. CCB Exh. 29.

42. In addition, on August 31, 1979, an internal Comsat memo indicated that: "Informal and unofficial discussions with members of the [DOD] indicate a number of things: (1) They would like to do business with Comsat directly. (2) In order to get that business, we must sharpen our pencil." CCB Exh. 21. David Gourley, director of sales and marketing at Comsat, wrote the memo and he stated that he did not meet with DOD for informal discussions but members of his staff did. Tr. 310. He explained that his direction to sharpen the pencil meant Comsat should attempt to be in the best competitive posture. Tr. 325. During September, 1979, Comsat explored various forecasts and prices for the service. The cost data established by September 19, 1979 for a first and second circuit were used in preparation of Comsat's best and final bid. CCB Exh. 33; Tr. 229-30. It was this cost data that was ultimately applied to the forecast for twenty-one circuits. CCB Exh. 12; Tr. 261.

43. In contrast, WUI bid without providing its own earth station because Comsat refused to furnish the space segment without use of its earth station. WUI Exh. 3, Exhs. H1-4. Comsat was willing to provide a quote for the space segment for informational purposes only. WUI Exh. 3, Exh. H-5. WUI had considered providing its own space segment, but under the circumstances it could not.

Conclusions of Law

44. The Commission found when it first considered Comsat's applications that the existing Guam earth station at Pulantat was grossly underutilized and that the general ratepayer was bearing the economic burden of the facility. *Communications Satellite Corporation,* 80 F.C.C. 2d 170, 181 (1980). In addition, the Commission pointed out that "Comsat and DOD propose to divert fifteen of the eighteen circuits slated for the subject 1.544 Mbps service from Pulantat to the proposed Finegayan station." *Id.* at p. 181, n. 31.[6] While the current use of the Pulantat station has increased significantly since the Commission's first order in the proceeding, the Common Carrier Bureau's testimony indicates that the Pulantat station is only now, when it is reaching the end of its service life, achieving use near its capacity. Furthermore, although the international carriers foresee a substantial increase in the use of the Pulantat station, their estimates are unsupported in this record. It cannot be assumed that their forecasts will occur. Historically the number of circuits routed

[6] The Commission also indicated that in 1969 Comsat had originally predicted that 67 circuits would be in use at the Pulantat facility by 1973. But that in February 1980 only 64 downlink and 66 uplink half circuits were being utilized. In its testimony in this proceeding Comsat stated that as of June 30, 1981 there were 79 half circuits in service at Pulantat. Comsat Exh. 7, p. 9. Recent traffic projections for which Comsat relies on the estimates of the U. S. international carriers, indicate that utilization at Pulantat could be expected to approach 169 circuits by 1985. Comsat Exh. 7, p. 9; Tr. 339.

through Pulantat has not always increased; for example, from 1975 to mid-1977 traffic declined at Pulantat.

45. Four of the DOD circuits that used the Pulantat station which DOD plans to route through Finegayan now use the underseas cable. In addition, four new circuits initiated by DOD in 1980 which now use the cable will also be routed through the Finegayan station. DOD's plans appear to be guided by two principles: All DOD satellite circuits destined only for Guam would use the Finegayan station and not Pulantat, but any decision to move traffic from the Pulantat station or the underseas cable would be dictated by the "most economic alternative" and the need for the security which Finegayan would provide. The proposed rates for circuits routed through the Finegayan earth station are higher than the rate for circuits routed through Pulantat. There is general agreement among the parties that unless there is a communications requirement for the non-duplicative national security features of the Hickam-Finegayan service, DOD traffic would not be diverted from the Pulantat earth station to the Finegayan earth station.

46. However, if Comsat's traffic forecasts are accurate a different conclusion would be required. Comsat expects the Hickam-Finegayan stations to transport government communications that have no apparent need for its special security measures; fourteen of the projected twenty-one half circuits fall into this category. For example, six half circuits are indicated in Comsat's forecast for transporting United States commercial television signals to the armed forces stationed abroad, two half circuits have been forecasted for video conferencing, and two half circuits have been forecasted for development through stimulation.[7]

47. In justification of any diversion, Comsat points out that the Pulantat station is now used to a greater degree than many other INTELSAT facilities. However, the statistical data it provided indicate that the Pulantat station only recently reached the level projected for the early seventies and it is not operating at capacity. Comsat Exh. 7, pp. 9-10.

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[7] Comsat describes as speculative the assumption that the projected Hickam-Finegayan traffic would use Pulantat if the new service is not authorized. This assertion ignores, however, that the only incentive for traffic to use the Hickam-Finegayan routing is its special security provisions and that for two-thirds of the projected circuits there is no such need. Of course, if Comsat's projections are unrealistic, it is in fact speculative to assume they would be diverted. Comsat also seeks to justify any traffic diversion by pointing to the Commission's view that there may be public policy reasons for not requiring each component of an integrated system to generate revenues to cover its costs. Comsat urges that the "uncontroverted" need for the Hickam-Finegayan service raises just such a public policy justification. There is, of course, no evidence that supports Comsat's view of the need for the Hickam-Finegayan stations except for those users which require their special security. In addition, the Hickam-Finegayan service is a facility dedicated solely to the United States Government and is not part of an integrated system.

Moreover, Comsat did not provide any information about whether the Pulantat station now recovers its costs. On this record, it can only be concluded that if Comsat is correct in its traffic projections for the Hickam-Finegayan earth station, traffic will be diverted from the Pulantat station.

48. Comsat's traffic projections are also significant in determining whether the rate proposed by Comsat is a just and reasonable charge. Comsat foresees significant traffic developing which would share the cost of the new dedicated earth stations. Comsat relies on a letter sent by Colonel Morris, Chief, Commercial Communications Policy Office, Defense Communications Agency, to all the carriers in the fall of 1978 for its forecast of one-third of the expected traffic of twenty-one half circuits. The remaining two-thirds of the projected circuits were forecasted from Comsat's informal discussions with potential users and its own business judgment. The Commission has already set a standard for review of such projections of traffic in this case: Comsat must provide "documentation or a firm commitment from other Government agencies" to substantiate its projections. *Communications Satellite Corporation, supra,* 80 F.C.C. 2d at p. 182.

49. The discussions which Comsat had with government officials about their future communications needs were informal and are not documented, and the letter from Colonel Morris to the bidding parties about future DOD plans is anything but a "firm commitment." The letter from Colonel Morris was written in September 1978. In that letter Colonel Morris described the planned circuits listed as "tentative" and he explained that if the circuits were ordered, the circuits would be purchased from the "most economic alternative." The original plan for the Hickam-Finegayan service included a link to the Philippines. By the time the bidding began that link had been dropped. The other possible satellite links in the Pacific which might have been an integral part of the Hickam-Finegayan system are just now the subject of a DOD feasibility study. Overall, DOD's plan to link overseas bases with commercial satellite service using Standard B earth stations has not developed because DOD has been unsuccessful in arranging for Standard B earth stations in any of the countries where the United States has military installations. True to the Morris letter's warning that DOD's plans are tentative, DOD's plans have changed. Moreover, in light of the feasibility studies now being undertaken by DOD, it is apparent that the plans outlined in the Morris letter are DOD's untested thinking.

50. The forecast for the fourteen remaining half circuits is essentially premised on Comsat's view that the available Hickam-Finegayan service will generate a demand by other government users. DOD has indicated that the four half circuits for the Air Force Digital Service "have not been

specifically planned," and when bids were let for such a service, Comsat did not bid. While the letting of bids for the Air Force service assists Comsat in establishing its argument that its projections are reasonable it is far from clear whether the forecasted circuits would use the Hickam-Finegayan stations when traffic routed through Pulantat is going to be charged at a lower rate.[8] The only circuits for which there was a from commitment and documentation are the three half circuits outlined in DOD's RFP.[9]

51. Comsat, in effect, is arguing for a more laissez faire Commission policy to be applied to the development of traffic forecasts and the initiation of new services. The Commission has already considered this argument and has pointed out that its regulation of Comsat is dictated by the environment in which Comsat exists: that of a "rate base regulated statutory monopoly with exclusive access to INTELSAT satellites." *Communications Satellite Corporation, Supra,* 80 F.C.C. 2d at p. 179. This requires the Commission "to apply traditional standards for licensing new facilities and services." *Id.* at p. 180.

52. Comsat's proposed traffic forecasts are key to determining whether the rate proposed is a just and reasonable charge. Comsat uses its unreasonable forecast to determine the units of service from which it would derive its revenue. Unless the other customers materialize, the dedicated service will not return the cost of providing the service and the general ratepayers (those who can make no use of the earth station

[8] As already indicated, DOD did state that it already has eight circuits on commercial cable that will be routed through the Hickam-Finegayan station. The record does not indicate whether these circuits are included in Comsat's forecast or whether they are in addition to those estimated by Comsat. Moreover, while DOD points to these circuits as scheduled for the proposed stations, it identifies the need for routing them through Hickam-Finegayan as being one of achieving diversity and redundancy. DOD Exh. 2, pp. 8-9. DOD does not explain whether these circuits need to be encrypted or whether the difference in charges between the existing service and the new service would be weighed in determining their route.

[9] Comsat argues throughout its proposed findings that when WUI provided market forecasts to support its tariff for service to NASA between the Goddard Space Flight Center and an INTELSAT Atlantic Ocean satellite (*Western Union International, Inc.*, 71 F.C.C. 2d 615 (1979)), the Commission did not apply the same standard that Comsat is being held to here. The Commission's opinion in the Goddard-Atlantic case does not demonstrate that that is the case. In that opinion, the Commission found WUI's traffic showing inadequate and required that WUI provide additional information to substantiate the projected traffic and its proposed rates. *Id.* at pp. 617, 619. While Comsat provides its own assessment of WUI's response to the Commission's directive, the Commission did not indicate why the showing provided by WUI was or was not satisfactory. Nor did the Commission in the Goddard-Atlantic case define what it would consider when an additional showing was made. In contrast, the Commission was not silent about what the standard would be here: It fully articulated the standard to be applied and indicated why the standard need be so precise.

dedicated to providing service solely to the U.S. Government) will pay for DOD's service. There is no question that the general ratepayers can bear such a burden since, as the Common Carrier Bureau pointed out, Comsat has during the preceding three years significantly exceeded its allowable rate of return.

53. While Comsat's traffic estimates are uncertain, its rate proposal is flawed in other respects. Comsat has never adequately explained why it is necessary to apply a present value factor to the ground segment fixed and variable costs in order to recover the revenue requirement of this service. Comsat in its reply pleading urges that the Commission has found such factoring acceptable. Comsat refers to the Commission's order initiating a rulemaking proceeding to determine what policies should be followed in authorizing new facilities in the North Atlantic during 1985-1995. *Policies for Overseas Common Carriers*, 82 F.C.C. 2d 407, 460-61 (1980). There the Commission recognized the need to discount estimates of future expenditures in order to determine their cost in current dollars. *Id.* at p. 461.[10] The Commission did not, however, suggest that discounting could be used to establish rates. Comsat also argues that its use of a present value factor is analogous to the Commission's recognition that some elements of the financing of plant construction may be included in the rate base and charged to the ratepayers although the plant is not in use. The analogy is imperfect, however, because here the money has already been expended by Comsat in building the facilities and the value traditionally given for a plant in use is the allowable rate of return. In effect, the discount, as Mr. Wellington points out, inflates the return.[11] Dr. Nelson found, for example, that the ground segment charge over five years would return $759,479 more than the total revenue requirement of the service. The record also indicates that Comsat averaged its unit cost figures which permits Comsat to project a relatively low revenue requirement but ultimately to recover considerably more.

54. The Commission in the Designation Order in this proceeding directed that a reasonable charge for the proposed dedicated service must return the total facility cost by the users of the facility. Comsat's proposed rates would not, principally because its traffic forecasts are inflated. But if its forecasts are correct, its proposed charges are still unreasonable because they would return more than the revenue requirement of the service. Accordingly, the public interest, convenience and

[10] See *American Tel & Tel Co. Charges for Interstate Tel. Service*, 64 F.C.C. 2d 1, 56-60, 393-99 (1977); *Comsat Rate Proceeding*, 56 F.C.C. 2d 1101, 1132-36 (1975).

[11] Even assuming the use of the discounting is proper in this case, Comsat has left unexplained why it used its rate of return as the discount rate; its application in a methodology to discount revenues is not self-evident. The Commission, for example, in proceeding which is examining 1984-1995 space communications costs used an inflation adjusted interest rate of four percent.

necessity would be served by prescribing the rate schedule proposed by the Common Carrier Bureau. The Bureau's proposal which is set out at paragraph 29 would eliminate the cross-subsidy on Comsat's general ratepayer, provide incentives for increased efficiency and usage, recover the revenue requirement for the service, and prevent discrimination among users. Dr. Boyd Nelson, who designed the prescribed rate structure, pointed out that it will give users the benefit of quantity purchase discounts without regulatory lag, and provide for payment of service actually used. It would also minimize Comsat's administration. Although DOD and Comsat suggested alternatives to the Bureau's rate proposal, the plans which they put forward would do no more than rely on accounting procedures to identify cross-subsidies. The Bureau suggested rates would prevent cross-subsidies from occurring.

55. WUI's complaint about Comsat's treatment of its carrier customers and competitors during the DOD bidding process for this service is also the subject of this proceeding. Comsat has exclusive access to INTELSAT satellites. "Other firms cannot launch their own satellites over the Pacific to provide service to DOD or any other user, and they cannot lease space segments directly from INTELSAT." *Communications Satellite Corporation, supra,* 80 F.C.C. 2d at p. 179. Therefore, if WUI or any of the intervenors in this proceeding wanted to submit a bid to DOD in response to the RFP for the 1.544 Mbps service, they initially had to ask Comsat what the charge would be to them for the service.

56. Sections 201(b) and 202(a) of the Communications Act and Section 201(c)(2) of the Communications Satellite Act prohibit discrimination in price and practices between different customers for the same service. Western Union International alleged in its complaint and has now established that Comsat quoted a rate to it and the other carriers that is significantly higher than the rate quoted to DOD for the same service. In addition, WUI has proven that Comsat limited WUI to requesting the prices for only the circuits ordered and installed while Comsat did not place that restriction on itself. WUI Exh. 3, Exh. H-3. Finally, WUI's evidence indicates that Comsat quoted WUI prices that required that WUI use Comsat provided earth stations. This, WUI claims, essentially foreclosed WUI from bidding its most competitive position, since it is only through the construction of its own earth stations that WUI might have had lower costs.

57. At least in part Comsat's actions were precipitated by its belief that it needed to compete against its carrier customers in order to maintain its control over the earth segment of the service proposed by DOD. Comsat was concerned from the outset that if it did not act to protect its control, the other carriers would build the earth stations needed to provide DOD's service. Comsat prevented such an action by

quoting only a combined or bundled price for the Hickam-Finegayan stations Comsat's other actions of only quoting rates for circuits actually ordered and installed and designing a rate structure for its own bid to DOD which did not consider such restrictions insured that Comsat would win the DOD bid. It also insured its dominance over the provision of earth stations. See *International Record* Carriers, 63 F.C.C. 2d 761, 765 (1977), *recon.*, 66 F.C.C. 2d 517 (1977), *aff'd sub nom. WUI* v. *F.C.C.*, 568 F. 2d 1012 (1978).

58. Comsat excuses its action in quoting different rates by explaining that in its own bid to DOD it decided to take a risk and assume there would be additional traffic. However, Comsat's view that its traffic forecasts were so risky that it could not use them to quote rates to the other carriers is inconsistent with its argument in this proceeding that the additional circuits would certainly result and should be used to determine the expected revenue.

59. WUI asks for damages from Comsat because it lost out in its bid to DOD. It identifies Comsat's differing charges and unwillingness to unbundle as the cause of its losing the bid. Comsat's behavior was obviously illegal and harmful to WUI; and there is no question that the Communications Act prohibits treating customers differently without some reasoned justification. But the record does not support a finding that WUI would have won the bid if Comsat had acted legally.

60. Dr. Nelson pointed out that the more probable result in a market structure like this – where the technology has no novel elements that are in the possession of any one bidder, where all the carriers are managerially quite capable, and where all the carriers know what the others are doing – is that all the carriers might bid the same thing. Tr. 871-72. In fact Dr. Nelson described such an outcome as being "highly probable." Tr. 873. He suggested that two factors distorted the bidding process from occurring as he described: There is only one customer for the service which all the carriers are attempting to gain. He explained that if there were many customers, the bids would probably have been close to the same price. Tr. 874. And Comsat's ability to control access to the service facilities and to determine the price for access limits what the other carriers can bid.[12]

61. Under these circumstances, WUI's argument of monetary injury is too speculative. Comsat has violated the Communications Act and the Communications Satellite Act by treating WUI differently from its other

[12] Dr. Nelson suggested that the bidding would have worked more efficiently if DOD had been more exacting in what it actually wanted and expected to purchase (the letter from Colonel Morris only served to encourage carriers to expand their forecasts beyond the RFP) and if Comsat had continued its traditional function of acting only as a carriers' carrier and had not competed with them.

customer, DOD. The Commission's orders in this proceeding indicate that the policies which either encourage or prohibit such actions are now being considered by the Commission. However, most likely the solution to the problem presented rests in other proceedings. The Commission stated in the first order in this proceeding that "[t]here are many questions about ownership of earth stations and authorized user policy which the Commission is or soon will be reexamining. Furthermore, the structure and functions of Comsat itself are undergoing exhaustive scrutiny in a pending proceeding." *Communications Satellite Corporation, supra,* 80 F.C.C. 2d at 179-80. The record in this proceeding should offer some guidance in resolving those proceedings.

ACCORDINGLY, IT IS ORDERED that Comsat FILE no later than 30 days from the release date of this Initial Decision, the schedule of rates and charges prescribed herein at paragraph 54 and set out at paragraph 29.

IT IS FURTHER ORDERED that Western Union International, Inc.'s request for damages IS DENIED.[13]

FEDERAL COMMUNICATIONS COMMISSION

EDWARD J. KUHLMANN *Administrative Law Judge*

[13] This decision is subject to exceptions and requests for oral argument pursuant to paragraph 13 of the Designation Order. In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Sec. 1.276(d).

Common Carrier, International
Comsat, Facilities Authorization
INTELSAT
Satellite Communications, Overseas

Application of Comsat to provide space segment facilities as part of INTELSAT Business Services program granted since found to be in the public interest. Authorization will facilitate the establishment of international digital business networks.
—*COMSAT*

FCC 84-124

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of Communications Satellite Corporation	File No. I-P-C-83-009
For such authority as may be necessary for it to participate in a program to provide satellite capacity for new digital business services as part of the Intelsat system.	

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted March 30, 1984 Released April 11, 1984

BY THE COMMISSION:

1. The Commission has before it an application filed by the Communications Satellite Corporation (Comsat) to participate in a program to provide spacecraft capacity optimized for digital international business services (IBS) to be offered as part of the INTELSAT system.

2. The application was placed on the Commission's October 27, 1982 Public Notice. Comsat filed a supplement to the application on January 4, 1983 and letters on August 12 and November 7, 1983, providing additional information about the applications.[1] Comsat stated in its November 7

[1] Comsat's initial application was limited to information available to it at the time of filing based on INTELSAT decisions on IBS. Comsat indicated that it would be filing additional information regarding the IBS proposal with the Commission as it became available.

letter that this letter together with its previous filings completes its application.

3. ITT World Communications Inc. (ITT) filed a petition to defer action which was supported by comments filed by RCA Global Communications, Inc. (RCA). Comsat filed an opposition. In addition, ITT and RCA filed comments in response to Comsat's supplement to which Comsat responded.

A. INTELSAT IBS Program

4. Under the IBS program, services would be all digital, integrated,[2] and would include voice, data and video teleconferencing. The program would provide for global connectivity, interactive point-to-point as well as point-to-multipoint operation. Comsat contemplates encryption bit rates of 64 kbps, 128 Kbps, 256 Kbps, 1.544 Mbps and 2.048 Mbps with service on a full-time, part-time or occasional use basis.

5. IBS services would initially be provided using existing standard earth stations which operate with spacecraft operating at $^{6}/_{4}$ GHz and $^{14}/_{11}$ GHz. However, one of the key features of IBS would be the ability to provide service to small earth stations located at or near user premises in order to cut down on the cost of expensive terrestrial facilities suitable for high-speed digital transmission. As will be discussed more fully herein, the location of earth stations near metropolitan locations would necessarily involve some modification of frequencies on future INTELSAT VA spacecraft already authorized by the Commission.[3]

6. In support of its application, Comsat stresses the growing demand for business services both in the U.S. and Europe. This demand, it says, is evidenced by the dedication of satellites for this purpose by the American Telephone and Telegraph Company (AT&T) and programs in Europe on national and regional levels to dedicate capacity for such programs. In order to meet the growing demand for international business services, Comsat states that INTELSAT has been actively investigating the provision of such services. Comsat further states that three European Signatories have already projected a requirement for forty-two 64 Kbps and seven 2 Mbps circuits to the U.S. in 1986 and eight 2 Mbps circuits to other points. Comsat projects that by 1990 ninety 64 Kbps circuits and

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Although complete economic and technical information was not available, Comsat nevertheless filed the application in order to comply with Commission procedures regarding participation in INTELSAT programs which call for the filing of applications well in advance of final action by the Board of Governors. Statement of Policy Concerning Procedures Applicable to Comsat's Applying for Commission Authorization to Participate In Certain INTELSAT Activities 46 FCC 2d 338 (1974).

[2] The term integrated as used herein means that there would be no distinction in the way each particular service is transmitted (e.g. data, voice, video or facsimile).

[3] Communications Satellite Corp., 91 FCC 2d 197 (1982).

sixteen 2 Mbps circuits will be required to satisfy traffic demand to the U.S.

7. Comsat states that, since existing U.S. earth stations are located some distance from potential business service customers, bringing such services to these stations would require the construction of expensive terrestrial facilities. Terrestrial facilities capable of handling high speed digital services are only now being constructed in the U.S. and even so are inadequate to meet current demand. Therefore, Comsat believes it is essential to provide for the location of earth station facilities closer to IBS users. However, Comsat states that frequency coordination problems make this difficult with existing INTELSAT spacecraft. For example, the 10.7-11.7 GHz band, portions of which are used for downlink transmissions on existing INTELSAT spacecraft, is shared with fixed terrestrial services both within Europe (ITU Region 1) and North America (ITU Region 2). Thus, significant terrestrial use of these bands effectively prevents the location of $^{11}/_{14}$ GHz antennas near major urban areas. However, Comsat points out that use of the 12.5-12.75 GHz band in Region 1 and the 11.7-12.2 GHz band in Region 2 for small IBS earth stations substantially reduces the coordination problem since these bands are allocated to fixed-satellite service on a primary basis and are not appreciably used by terrestrial services.[4]

8. Comsat indicates that difficulties encountered in the use of the 10.7-11.7 GHz band, particularly in Europe, has prompted consideration by INTELSAT of modification of the downlink frequencies on certain INTELSAT spacecraft. INTELSAT's objective is to provide space segment facilities that will complement those being introduced in national networks so as to permit international access to such services. Accordingly, INTELSAT has been developing new IBS earth station performance characteristics which would allow the stations to commence operation with the existing $^{11}/_{14}$ GHz facilities, but which could be converted to $^{12}/_{14}$ GHz to work with the modified satellites when these are available in orbit. Three sizes of earth stations are included in the performance characteristics: approximately 3.5 meters, 5.5 meters and 8.0 meters in diameter.

B. Spacecraft Options Considered by INTELSAT

9. Comsat's initial application showed that INTELSAT was considering three separate options for the provision of business services in the $^{12}/_{14}$

[4] In this regard, Comsat references an agreement reached at the 1979 Space WARC with respect to the use of the 11.7-12.7 GHz band in Region 2. According to that agreement, use of that band "by fixed satellite and broadcasting satellite services is limited to national and subregional systems. . . ." Thus, Comsat is seeking development of spacecraft designs which would allow direct 12 GHz reception by European users while preserving U.S. prerogatives to use either 11.7-12.2 or existing 11 GHz bands in North America.

GHz band which would make possible the location of earth stations closer to users. The three options contemplated some form of modification of INTELSAT VA satellites. INTELSAT VI satellites and use of the UNISAT system. A mix of these various options was also being considered by INTELSAT.

10. With respect to the proposed modification of INTELSAT VA and VI satellites, two alternatives were to be considered. First, development of a retrofit option to be introduced on INTELSAT VA (F-14) and (F-15) satellites was considered. Under the retrofit option the spacecraft would be disassembled and the components changed so that the resulting spacecraft would be suitable for the new business services. After completion of the retrofit process the bands would be 14.0-14.25 GHz on the uplink and 11.7-11.95 GHz for the west downlink and 12.5-12.75 GHz for the east downlink. The coverage of these satellites would remain the same as for INTELSAT VA $^{11}/_{14}$ GHz coverages. The retrofit option would be the same basically for INTELSAT VI satellites.

11. Second, INTELSAT considered a switchable option under which both the desired $^{12}/_{14}$ and existing $^{11}/_{14}$ GHz payloads would be employed with selection of the desired band through ground command switching. The switchable option would involve the addition to INTELSAT VA F-14 and F-15 spacecraft of the components needed to satisfy either the $^{11}/_{14}$ GHz requirements or the new IBS requirements at $^{12}/_{14}$ GHz. This would include the addition of 72 multiplexers and upconverters for operation in the business bands, as well as switches for transferring from one mode of operation to the other. The performance parameters would be the same as under the retrofit option. The switchable option would be basically the same for INTELSAT VI satellites with one exception. Since the INTELSAT VI has more transponders in the $^{11}/_{14}$ GHz subsystem than the INTELSAT VA, it would be possible to provide normal telephony services in the $^{11}/_{14}$ GHz band while simultaneously providing new business services at $^{12}/_{14}$ GHz in the same three transponder pairs as would be available on the INTELSAT VA satellites.

12. The final option set forth in Comsat's initial application was use of the United Kingdom's UNISAT system by 1987. The frequency bands in which the UNISAT business transponders would operate would be 14.0 to 14.5 GHz for the uplink, the 11.75 to 12.2 GHz band for the west downlink and the 12.5 to 12.75 GHz band for the east downlink.

13. In addition to these distinct options, INTELSAT considered certain hybrid options which would involve (a) use of INTELSAT VA and VI satellites; (b) INTELSAT VAs and UNISAT and (c) INTELSAT VIs and UNISAT. Consideration of these hybrid proposals was prompted by the desire to have a fully-spared new business services capability, instead of

modifying either only two INTELSAT VAs or only two INTELSAT VIs, while minimizing costs.

14. In its initial application, Comsat estimated the preliminary costs of modifying two INTELSAT VA satellites under either of the first two options to be $25-$28 million in 1982 dollars. Preliminary estimates in 1982 dollars for modifications of INTELSAT VI satellites to the switchable option ranged from $23 million for one satellite to $34 million for two satellites. Comsat updated its initial cost estimates in its January 11, 1983 supplement and changed its estimated costs for each switchable modification of INTELSAT VA spacecraft to $23-$25 million (December 1982 dollars) and the cost of modifying two INTELSAT VI spacecraft to $19.995 million.

15. Although the UNISAT offer had not been negotiated, a minimum capacity lease was offered subject to the addition of other options. The minimum lease would last for seven years and would involve two spared transponders or four unprotected transponders. In 1982 dollars, the annual cost for the lease of one pair of spared transponders would be $9 million. With an annual escalation factor of 10 percent, the charge would be approximately $12.8 million in 1986, the starting date of the lease, and would increase to $22.8 million in the last year of the lease, resulting in an average annual charge of $17.4 million during the lease. Charges for the lease of the two unprotected transponders pairs would be $12.9 million in 1982 dollars, $18.2 million for the first payment at the beginning of service and $32.5 million for the last payment, resulting in an average annual cost of $24.8 million. In its supplement, Comsat reported that British Telecom International had revised its offer for $^{12}/_{14}$ GHz band capacity. The minimum requirements of the lease agreement remain the same as in the application, but the price of the lease would total $11.0 million in the first year, and $19.5 million in the seventh year, resulting in an average annual cost of $14.9 million over the entire seven year period compared to $17.4 million as stated in the application.

16. In its supplement, Comsat expressed uncertainty about the retrofit option since this option would necessitate disassembling a nearly completed spacecraft and reassembling it with the new communications payload and would subject the spacecraft to excessive handling with the possibility of damage.[5] According to Comsat, the additional testing would impose added stress on previously accepted spacecraft hardware, and thus might result in increased risk with regard to component lifetime, manufacturing errors in the disassembly/reassembly process, and sched-

[5] Since the retrofit option for INTELSAT VI satellites would also result in an eleven month delay in addition to the operational disadvantages, Comsat stated that it was not considered further. The switchable option for INTELSAT VI satellites would not cause a program delay.

ule. Moreover, once retrofitted with the business services payload, the spacecraft would no longer be usable for the conventional 11/14 GHz international services since that hardware would be deleted in the retrofitting process. In addition, the delay for the delivery of a retrofitted INTELSAT VA (F-14) would be one and a half months longer than originally anticipated, with delivery of the INTELSAT VA (F-15) occurring two and a half months later. Because of the operational, schedule, and program aspects of the switchable and retrofit proposals, Comsat stated that its preferred approach for INTELSAT VA satellites would be the baseline switchable option. According to Comsat, this approach offers a higher degree of operational flexibility than does the retrofit option by virtue of including both international and business services packages on board the spacecraft, with the actual service selected by ground command. This flexibility permits the switchable INTELSAT VA to serve in a variety of operational roles at different times during its useful in-orbit life, a necessary feature in view of the number of INTELSAT VAs required for regular international service and the launch success probabilities.[6]

17. Comsat concluded that on a simple cost basis the least expensive approach would be to modify either INTELSAT VAs or VIs. Comsat believes, however, that reliance on modification of only two INTELSAT VAs to provide capacity involves a very high exposure to the risk of unprotected service in the event of launch failure in one of the two attempts; in such a case service would remain unprotected until such time as additional capacity could be obtained, at an undetermined cost. In addition, service could only be provided in the Atlantic Region. Comsat does not consider this approach viable. Similarly, it noted that the approach of modifying only two INTELSAT VIs suffers the same unacceptable susceptibility to launch failure.

18. The Board of Governors at its March 1983 meeting decided to modify INTELSAT VA (F-14) and (F-15) spacecraft by incorporating a fully switchable business service capability at a cost of $23,825,000 in December 1982 dollars plus orbital incentives. In addition, the west spot beam in the INTELSAT V-A (F-14) and (F-15) will be expanded to provide improved coverage of the U.S. and Canada at a cost of $750,000 plus incentives. Comsat further noted that INTELSAT was considering the procurement of at least one more spacecraft equipped for business

[6] In contrast with the INTELSAT VA and VI modification options, Comsat noted that the UNISAT business payload would not provide the capability to operate in the 11 GHz band for the west downlinks in the event the 12 GHz band cannot be used for these international services in Region 2. It indicated that additional information had been requested on the possibility of either switchable west downlink frequencies or a later frequency selection.

services to provide for spared service in the event of launch or early failure of the INTELSAT VA (F-14) or (F-15). Comsat specified that INTELSAT was considering either the INTELSAT V (F-9) or the INTELSAT VA (F-13) to provide spared capacity. Comsat also provided cost information for each option, and concluded that financial and operational considerations favored use of the INTELSAT VA (F-13).[7] In its November 7, 1983 letter, Comsat stated that at its September, 1983 meeting the INTELSAT Board of Governors authorized modification of the INTELSAT VA (F-13) to provide spare capacity. According to Comsat, the cost of the modifications will be approximately $9 million (1982 dollars) plus in-orbit incentives.

C. Responsive Pleadings

19. ITT's petition asks the Commission to defer any action on the subject application until: (a) Comsat makes all pertinent INTELSAT information available concerning IBS and an opportunity to comment is afforded to all interested parties; and (b) Comsat's competitive activities are transferred to its non-monopoly separate subsidiary established by the *Comsat Structure Order*, 90 FCC 2d 1159 (1982). ITT argues that a conflict between Comsat's competitive activities and its ability to satisfy its traditional, fiduciary role as INTELSAT representative of, *inter alia*, other U.S. international carriers. According to ITT, this conflict is made particularly evident by the Commission's decision in *Authorized User Revisited*, 90 FCC 2d 1394 (1982), which directs Comsat to provide service directly to non-carrier users who acquire terrestrial lines to U.S. earth stations.[8] ITT considers Comsat's provision of service directly to non-carrier users to be competitive with other U.S. international carriers. ITT does not believe that Comsat can occupy a position of fiduciary responsibility to U.S. carriers while competing with them in this manner. And, it believes that this problem will be more acute with the IBS program since IBS calls for location of earth stations close to non-carrier basis.
In essence, ITT appears to believe that Comsat's interest in serving non-carrier users will color its decision to support and promote IBS within INTELSAT. Because of the conflict that it perceives, ITT contends that it should not be expected to comment on this application based solely on Comsat's unverified version of considerations before INTELSAT. ITT

[7] The costs for modifying the INTELSAT V (F-9) range from $12-$26 million depending on whether a partial or fully switchable option is incorporated. The cost of making the INTELSAT VA (F-13) identical to the INTELSAT VA (F-14) and (F-15) would be approximately $9 million plus incentives and $750,000 for modifying the west spot beam.

[8] On January 13, 1984, the D.C. Circuit Court of Appeals in Case No. 79-1046 vacated the *Authorized User Revisited* decision and remanded it to the Commission for further proceedings.

desires to build an IBS earth station in the New York City area[9] and, for this reason, believes it has a right to INTELSAT information showing whether the various alternatives considered by INTELSAT would adversely affect its plans or provide undue competitive advantages to Comsat. And, even if it is provided such information, ITT believes that the basic conflict of interest between Comsat's fiduciary and competitive roles will remain. To remedy this problem, ITT urges the Commission to require Comsat's competitive activities to be performed by a separate subsidiary.

20. RCA requests that Commission action be deferred until: (a) Comsat reports that the INTELSAT Board of Governors has approved a specific program for digital business services; (b) the terms of access to the INTELSAT space segment are clarified; and (c) Comsat provides more information regarding the demand for business services. With respect to the access issue, RCA wants to know who will be allowed to own the earth stations and what rates for space segment will be applicable for service. As to traffic forecasts, RCA argues that Comsat's application and supplement lack a description of the assumptions and sources of demand for the consolidated forecast for the Atlantic Region between 1986 and 1990. RCA believes this information should be required since INTELSAT planning documents show that its global traffic projection through 1987 is overstated by ten percent and INTELSAT has admitted that traffic requirements should become clearer in 1983.

21. In response to claims regarding the availability of Intelsat documents, Comsat states that the issue is currently the subject of the *Comsat Structure* proceeding, and is improperly raised here. Comsat views ITT's argument that it not be allowed to provide service directly to end-users at U.S. earth stations as being contrary to the Commission's *Authorized User Revisited* decision and irrelevant to the current application.[10] With respect to the issue of ultimate earth station ownership, Comsat notes that it is also the subject of a separate proceeding. Comsat also points out that questions concerning ownership of specific individual earth stations is appropriate only when applications are filed for such stations with the Commission. Finally, Comsat asserts that the consistency between the *Authorized User Revisited* and *Corporate Structure* decisions has already been addressed by the Commission in the *Corporate Structure* proceeding and need not be considered further here.

22. Similarly, Comsat asserts that questions regarding applicable rates for space segment are not at issue here where the only concern is

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[9] On March 23, 1984, ITT filed applications (File Nos. CSG-84-027-P/L and I-T-C-84-111) to construct and operate an international earth station at its New York operating center and to establish channels of communication between said earth station and an INTELSAT Atlantic Ocean Region satellite for the provision of international digital business services.

[10] See footnote 8 supra.

Comsat's participation in an INTELSAT program to provide satellite capacity. It argues that the question of rates will be considered independent of the instant application. Finally, Comsat urges the Commission to take official notice of developments which signal the increasing importance of digital business services. It also cites the Consolidated Planning Forecast, which is based on individual Signatory estimates, as sufficient to justify the phased approach to business services. Comsat points out that between 1984 and 1986 services may be provided using existing spacecraft and during this period a clearer identification of the expected demand can be obtained.

Discussion

23. After consideration of Comsat's application, we find that the public convenience and necessity will be served by authorizing Comsat to participate in the INTELSAT Business Services program. In support of its application Comsat furnished preliminary consolidated planning forecasts expressed in Mbps for the Atlantic Region for K band ($^{11}/_{14}$ GHz) and C band ($^{4}/_{6}$ GHz) facilities. These forecasts were developed based on anticipated service requirements for 1986, 1988 and 1990. Specifically, these forecasts demonstrate a requirement for 77 Mbps for K band and C band coverage for all modes of connectivity (i.e. east-west, west-east, east-east and west-west) in 1986. Requirements are expected to increase to 131 Mbps by 1988 and to 176 Mbps in 1990. Comsat indicates that requirements for six countries in other ocean regions have been identified and that forecasts are being developed for these regions. However, Comsat notes that requirements for the Atlantic Ocean region itself are so high as to require use of more than the new $^{12}/_{14}$ GHz spacecraft capabilities described in its application.

24. Although forecasting is not an exact science, we believe that Comsat's projections, based on the requirements of signatories, show a need for the proposed service. This Commission has previously recognized the need for international digital business services in authorizing the applications of American Satellite Company and Satellite Business Systems to provide business services between the U.S. and Canada.[11] We believe that the instant proposal for Comsat to participate in the IBS program will further contribute to satisfying the need for such services. Authorization of Comsat's proposal will provide the means for these heretofore domestic business services to be extended overseas. Indeed, authorization of Comsat's business service application will provide customers with a wider array of services tailored more specifically to the

[11] Satellite Business Systems, 88 FCC 2d 195 (1981); and American Satellite Company, 88 FCC 2d 178 (1981).

needs of business customers, and will allow such customers to establish their own digital networks.

25. In addition to the need for these services, the IBS program will have certain operational, technical and cost benefits. Because the instant proposal envisions the location of earth stations closer to major users, the need for expensive terrestrial facilities will be eliminated, resulting in cost savings to users. Moreover, operational reliability will be increased due to the fewer number of transmission links involved in the international transmission. Also, the instant proposal is expected to result in improved transmission quality and the elimination of double hop transmission delays which could normally be required to access existing INTELSAT earth stations. In view of the need for this service and the operational, technical and cost benefits involved, we find that the public convenience and necessity are served by the authorization of Comsat to participate in the IBS program.

26. We also find INTELSAT's decision to modify INTELSAT VA spacecraft with the switchable baseband option to be a reasonable approach for providing IBS service. The switchable option, under which modified INTELSAT VA spacecraft will have the ability to switch between $^{12}/_{14}$ GHz and $^{11}/_{14}$ GHz payloads for IBS and regular services, is superior to the retrofit option since no conventional 11 GHz services could be provided once the spacecraft is retrofitted with the IBS payload. Moreover, INTELSAT's decision to modify the INTELSAT VA (F-14) and (F-15) is less costly in respect to the proposed lease of UNISAT transponders and operationally more attractive than modification of INTELSAT VI spacecraft. With respect to the UNISAT proposal, the lease agreement would cover a minimum seven year period with a total cost of approximately $104.3 million which translates into an annual average cost of $14.9 million. In comparison, the cost of modification of the INTELSAT VA (F-14) and (F-15) spacecraft would be approximately $23.80 million plus $750,000 for expanding the West spot beam and orbital incentives. Although the cost of modifying two INTELSAT VI spacecraft ($19.9 million) would be less than the cost of modifying two INTELSAT VA spacecraft, the INTELSAT VA satellites are scheduled to be launched in 1985, allowing IBS service to be initiated at an earlier time via these modified satellites than would be possible using modified INTELSAT VI spacecraft. Thus, adoption of the proposal to modify INTELSAT VA spacecraft is the most operationally expedient.

27. We reject the requests of ITT and RCA that we defer action on the application until Comsat provides additional unspecified information and until Comsat's competitive activities are turned over to its separate subsidiary. The first of these contentions appears to focus on the information contained in Comsat's initial application and supplement and

on the inability to gain direct access to INTELSAT documents. We find that the totality of Comsat's filings in this proceeding provides us with sufficient information to now take favorable action on its application. Comsat noted in its initial application that consideration of the IBS proposal by INTELSAT was an evolutionary process and that it would be providing additional information as it became available from INTELSAT. Comsat provided such additional information up to notification of INTELSAT's ultimate choice among the three available alternatives. We viewed Comsat's application as being informative and an attempt to satisfy its duty as U.S. representative to INTELSAT to make known options that were being considered. In any event, since Comsat continuously supplemented its application and INTELSAT has now made a final decision, this issue is no longer relevant.

28. ITT argues that the furnishing of additional information did not remedy its concerns since it could not be sure of the information furnished by Comsat because of the inherent inconsistency in Comsat's role as fiduciary and competitor. To this end, ITT and RCA have expressed the desire to have direct access to INTELSAT documents. However, this is not the first time that this issue has been raised. In *Authorized User Revisited* and *Comsat Structure,* the carriers argued that Comsat's access to INTELSAT-generated technical and other information gives it a competitive advantage that they could not overcome unless they are allowed to observe INTELSAT proceedings and have access to INTELSAT information.[12] In response to those arguments we point out that in our *Comsat Structure Order* we directed Comsat to broaden public access to INTELSAT Board of Governor's documents consistent with requirements imposed on us by the Freedom of Information Act (FOIA). We have also prohibited Comsat from releasing these documents to its competitive subsidiaries before release to the public. While the INTELSAT document distribution program at the Commission is still in its final stages of development, Comsat has its own program for distribution of INTELSAT documents. Neither ITT nor RCA has stated that it has attempted to procure the information it wishes through this procedure.[13] And, since the requests for information are not specific, we cannot make a determination here whether its confidentiality is protected under the

[12] Authorized User Revisited, *supra*; Comsat Structure Reconsideration, Mimeo No. 32898 (released April 20, 1983).

[13] In any event, we find no basis for concluding that any party has been prejudiced in connection with the instant application. ITT and RCA do not specify what information Comsat may be withholding or present convincing arguments as to why the information supplied in Comsat's total filings is insufficient.

FOIA.[14]

29. Finally, we reject ITT's and RCA's request that we defer action on this application until such time as Comsat transfers all of its competitive activities to separate subsidiaries. Apparently, this request is based on the conclusion that Comsat's offering of IBS services will be a competitive activity which is required to be offered through a separate subsidiary pursuant to our *Comsat Structure Order.* In the *Comsat Structure* decision we determined that Comsat's participation in INTELSAT activities could be accomplished through its World Systems Division. On reconsideration, we found that the furnishing of INTELSAT transmission capacity to carriers and noncarriers under the same terms and conditions is properly accomplished by Comsat's World Systems Division. In granting this application, we are authorizing Comsat to pay its investment share to INTELSAT for construction and operation of spacecraft facilities to provide IBS services. Thus, this function and the provision of space segment capacity for IBS services are properly accomplished through Comsat's World Systems Division under the *Comsat Structure Order.*[15] As for the earth segment portion of IBS service, we will consider issues about the ownership and operation of IBS earth stations in the Notice of Proposed Rulemaking that we are adopting today in *U.S. Earth Station Ownership,* Docket No. 82-540. Resolution of these issues, however, need not delay action on the application.

30. After review of Comsat's application as supplemented, and the pleadings filed in response, we find that a grant of the subject application is required by the public convenience and necessity.

31. Accordingly, IT IS ORDERED that the application of the Communications Satellite Corporation, File No. I-P-C-83-009, to participate in the Intelsat Business Services Program, IS GRANTED.

32. IT IS FURTHER ORDERED that ITT and RCA's petitions to defer action are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

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[14] The Commission has withheld from public access INTELSAT business planning documents which detail technical and strategic business concerns associated with the expansion and improvements of existing services or the development of new ones.

[15] We make no determination here that Comsat may provide IBS to non-carriers. We are only authorizing Comsat to pay its proportionate investment share for the IBS program and to provide transmission capacity as it has traditionally done to international carriers. Compare the D.C. Circuit Court of Appeals' reversal and remand of Authorized User Revisited, Case No. 79-1046, January 13, 1984.

Common Carrier
INTELSAT
Satellite Communications, International, Policy re

Commission granted authority to the Communications Satellite Corporation to construct a satellite earth station at the Teleport complex, Staten Island, New York and to operate it with INTELSAT satellites for the provision of International Business Service.
—*COMSAT*

FCC 84-126

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of COMMUNICATIONS SATELLITE CORPORATION For authority to construct and operate 11/14, 12/14 GHz international earth station facilities at the Staten Island, New York Teleport Complex communicating with INTELSAT Atlantic Ocean Region satellites for the provision of international digital business services.	File No. CSG-83-034-P/L
In The Matter of COMMUNICATIONS SATELLITE CORPORATION For authority under Section 214 of the Communications Act of 1934, as amended, to establish channels of communications between 11/14, 12/14 GHz international earth station facilities at the Staten Island, New York Teleport Complex and INTELSAT Atlantic Ocean Region satellites for the provision of international digital business services.	File No. I-P-C-83-067

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: March 30, 1984 Released: April 11, 1984

BY THE COMMISSION:

1. We have before us applications filed by the Communications Satellite Corporation (Comsat) pursuant to Sections 214, 304, 309 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 214, 304, 308, 309 and 319 (1983), and Sections 201(c)(4), 201(c)(6) and 201(c)(7) of the Communications Satellite Act of 1962, as amended, 47 U.S.C. 721(c)(4), (c)(6) and (c)(7) (1983), to construct an international earth station facility at the Teleport complex at Staten Island, New York and operate it with INTELSAT Atlantic Ocean Region (AOR) satellites for the provision of International Business Services (IBS). The applications were placed on public notice on August 3, 1983. M/A-COM, Inc. (M/A-COM) filed a petition to deny or impose conditions on the applications. American Telephone and Telegraph Company (AT&T), RCA Global Communications, Inc. (RCA) and MCI International, Inc., jointly with Western Union International (MCI/WUI) filed comments on the applications. Comsat filed an opposition to M/A-COM's petition to deny and a response to the comments of other parties. M/A-COM filed a reply to Comsat's opposition and AT&T filed a reply to Comsat's response.

2. Comsat intends to operate the proposed facilities in conjunction with INTELSAT's recently developed IBS offering.[1] IBS is a flexible, totally digital[2] integrated service designed to accommodate a full range of user applications, including telex, voice, facsimile, data and teleconferencing. INTELSAT has designed the space segment capacity for IBS, unlike its standard capacity, to enable a single transponder to accommodate multiple earth station accesses, including access by a range of small and medium sized antennas. The IBS capacity is further designed to accommodate user networks through a variety of connectivity arrangements. IBS service will be available on a full-time, part-time, and occasional use basis.

I. The Applications

3. Comsat proposes a 9.0 meter international Ku band transmit/receive facility with INTELSAT Standard E-3 parameters.[3] The Standard E-3 earth station was recently approved by INTELSAT for operating in

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[1] Comsat filed an application (File No. I-P-C-83-009) for authority to participate in the INTELSAT program to provide spacecraft capacity optimized for IBS on October 15, 1982. Comsat filed supplements to the application on January 4, August 12 and November 7, 1983. The later supplement completed the application. We are granting the application today in a concurrent proceeding.

[2] Comsat states that IBS services include digital communications channels operating at speeds of 56 kilobits per second and higher.

[3] Comsat's original applications specified a 7.7 meter antenna. By a letter received by the Commission February 2, 1984, Comsat modified its applications to specify a nominal 9.2 meter antenna. By another letter received February 23, 1984, Comsat indicated that the actual antenna diameter would be 9.0 meters.

the 11/14 GHz and 12/14 GHz frequency bands with new INTELSAT space segment for IBS services. Comsat will initially operate the proposed station in the 11/14 GHz band. Comsat estimates that it will operate the station in the 12/14 GHz band in early 1986 when the INTELSAT V-A satellite specifically modified for the provision of IBS in the 12/14 GHz band becomes available.[4]

4. In addition to the 9.0 meter Standard E-3 antenna, the proposed facility will include two 1000 watt klystron amplifiers operating in one-for-one redundant configuration, low noise receivers also operating in a one-for-one redundant configuration, and a broadband GCE subsystem consisting of one-for-one transmit and receive configurations. The monitor and control system will consist of a centralized monitor and control mimic panel providing alarm and status information of all station operations. Comsat states that its headquarters will maintain the capability to obtain status information or turn-off RF power on a full-time basis during the initial three month "shakedown" period.

5. Comsat plans to locate the proposed facilities at the Staten Island, New York Teleport Complex. Comsat states that the site is owned by the City of New York which has agreed to make it available through a lease arrangement to the Port Authority which will in turn make the necessary portion available to Teleport Communications, a partnership between a subsidiary of Merrill Lynch and Western Union Telegraph Company. A fiber optic cable network, provided over rights of way owned by the Part Authority, will connect the Teleport with the Manhattan World Trade Center and the Journal Square Transportation Center in Jersey City, New Jersey. From these two locations information will be switched to other users in the metropolitan area. Comsat indicates that the fiber optic facilities planned thus far would be operated by the Teleport partners but that a variety of connectivity arrangements would be available to other interested carriers.

6. Under current Commission policy now under review in the earth station ownership proceeding in CC Docket Number 82-540,[5] most U.S. international earth stations are jointly owned by Comsat (with fifty percent ownership of each earth station) and other U.S. international carriers (which share the remaining fifty percent ownership). Comsat serves as manager of each station subject to overall control and guidance on basic policy and investment matters by the Earth Station Ownership Committee (ESOC), a committee composed of all owners.

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[4] INTELSAT is modifying its V-A satellite series to carry the IBS space segment in the 12/14 GHz band. The V-A satellites are scheduled to be launched in 1985 and to be operational in 1986.

[5] *See* U.S. Earth Stations, 90 FCC 2d 1458 (1982).

7. Comsat states that, in conformance with this general policy, it presented the Teleport facility matter to the Joint Owners of the contiguous U.S. Earth Stations on June 1, 1983. In light of the pendency of the Commission's earth station ownership proceeding, and the Joint Owners' desires to take no action concerning the Teleport facility which might be interpreted as either precedential or inconsistent with their individual views on ultimate earth station ownership, the Joint Owners declined to participate in ownership of the station, according to Comsat. Comsat has therefore chosen to file the subject applications on its own behalf. Comsat states that it has no intent by this action to either prejudice or prejudge the earth station ownership issues now before the Commission, but rather to meet what it sees as the emerging need for international business services out of the New York area in as expeditious a manner as possible. Comsat has therefore agreed that ultimate ownership of the station will be subject to the outcome of the earth station ownership proceeding.

II. The Pleadings

8. In their comments, MCI/WUI and RCA both concur that any grant of Comsat's application prior to the resolution of the earth station ownership proceeding should be conditioned on the findings and outcome of that proceeding. RCA also states that any such conditional grant should include a trust arrangement for the station. RCA joins with AT&T, however, in advocating that no action be taken on Comsat's application until after that proceeding is fully resolved. To do otherwise, they contend, would enable Comsat to increase its "head start" and further entrench its dominant position of being the only owner of international earth stations outside of ESOC. AT&T also states that because it believes the services to be offered are competitive in nature, Comsat should be required to separate its investment and expenses associated with the Teleport project from its ESOC operations and that the costs of the earth station should be unbundled and separated so as not to adversely affect the ESOC participants or the users of the unbundled space segment. MCI/WUI emphasizes that any authorized carrier should be entitled to unbundled and reasonable space segment rates and that Comsat's proposed Teleport station should be entitled to no preferences in terms of regulatory treatment. MCI/WUI contends that the profitability or non-profitability of the station should be governed by marketplace forces rather than regulatory protectionism.

9. Comsat, in its reply to these comments, notes that AT&T, MCI/WUI and RCA, do not object to these applications. Comsat asserts that these carriers, believing that they would be prohibited for a period of time from applying for authority to construct IBS earth stations if Comsat's earth station ownership proposal is adopted, are concerned with a possible

"head start" or "entrenchment" of Comsat in the marketplace for IBS services. Comsat reiterates that it originally approached these carriers in the interest of the proposed station being jointly owned by the ESOC members. Comsat also states that its proposal in the earth station ownership proceeding would not preclude other carriers from independent ownership of IBS earth stations during any "transition period" between the adoption of new ownership policies and the time Comsat has proposed for independent station ownership as a general case. Comsat claims, therefore, that given the opportunity to participate in a combination earth station or to construct their own earth station, there is no basis for the carriers' concerns regarding any attempt by Comsat to entrench itself in the IBS market.

10. In its reply to Comsat, AT&T states that Comsat's concession in the earth station ownership proceeding that there can be independent ownership of IBS stations is in reality an extremely narrow one because of conditions Comsat has requested. AT&T quotes Comsat as insisting that special purpose earth stations, including IBS stations, be authorized only so long as they are governed by ". . .precise regulatory criteria including the requirement that the station be self-sustaining and that it be used to provide a single telecommunications service to a single carrier that could not be provided by a general purpose earth station." AT&T also emphasizes that it declined to have the Teleport earth station as part of ESOC because of the pendency of the earth station ownership proceeding and the changes which it proposes to earth station ownership and the status of ESOC.

11. In its petition to deny, M/A-COM maintains that Comsat's applications should not be granted because they are contrary to Commission policy and are technically defective. Comsat seeks to gain unfair competitive advantage over other international carriers by pre-emptively installing a "special-purpose" earth station prior to the Commission's policy determination in the earth station ownership proceeding, according to M/A-COM. M/A-COM suggests that the applications are also so substantially defective that they should be returned as unacceptable for filing. Specifically, M/A-COM states that there is no showing of site availability or availability of local channels to connect to customers and that the earth station specifications do not comply with the Commission's recent satellite spacing order.

12. In the event that the Commission decides to grant Comsat's applications, M/A-COM requests that the following conditions be made part of the grant: (1) Comsat be required to disclose all INTELSAT information used in planning the Teleport station and its services; (2) the grant be withheld pending the adoption of new earth station ownership policies by the Commission; (3) the grant be made to a Comsat subsidiary

other than World Systems Division; (4) contracts between Comsat and the Teleport partnership be made part of the public file; (5) Comsat be required to show Section 214 authorizations for local channels connected to the station; (6) Comsat be required to show that its proposed station will comply with the Commission's new technical requirements; (7) Comsat be required to procure the facilities competitively; and (8) customer's using the station be required to pay its full costs (no cross-subsidies from revenues of non-competitive services).

13. In opposition to M/A-COM's petition, Comsat's claims that M/A-COM's concerns are unfounded and have no factual basis. Comsat states that it believes other carriers should be permitted to file applications for stations accessing IBS during the "transition period" and that there is no basis for M/A-COM's allegations that Comsat is seeking to improperly position itself in the market for IBS services. With regard to the acceptability of the application for filing, Comsat claims that although a contract has not been executed for the Teleport site, it is currently engaged in negotiations that it expects to conclude shortly and that no more firm showing is required by the Commission. Comsat also states that it will file a copy of the contract with the Commission upon concluding negotiations. Comsat states that the portion of the service between the earth station and the customers' locations will be the responsibility of retail carriers and that it is Comsat's understanding that Teleport Communications will file the necessary application for Section 214 authority in the near future.

14. With regard to M/A-COM's concerns about the station's technical standards, Comsat points out that its Teleport applications were filed prior to the Commission's decision in the satellite spacing proceeding but that it expects, nevertheless, to comply with the revised standards. Comsat claims that M/A-COM's request that the Commission require the licensing of the station through a subsidiary other than the World Systems Division is without legal foundation. According to Comsat, its participation in the construction and operation of the station directly relates to its jurisdictional INTELSAT activities and that nothing in the Commission's *Structure Order*[6] or the Communications Satellite Act of 1962, as amended, requires Comsat to use a separate subsidiary to provide its jurisdictional services. With respect to M/A-COM's requested condition that Comsat be required to disclose all INTELSAT information used in planning the Teleport station, Comsat claims that the only document cited by M/A-COM relevant to the INTELSAT's IBS service is a working document which has been superseded by a recently released public document from INTELSAT which sets forth elements of the service (including the final "adjustment factor" cited by M/A-COM) which it has

[6] Comsat Structure Decision, 90 FCC 2d 1159 (1982).

approved. Finally, Comsat states that it will procure the station facilities in accordance with the Commission's Rules.

15. In its reply, M/A-COM states that it is satisfied with most of Comsat's explanations and expressions of apparent willingness to meet M/A-COM's proposed conditions. However, M/A-COM contends that Comsat has failed to adequately respond to certain of its concerns. M/A-COM believes that application of a separate subsidiary requirement is still essential to ensure that the proposed station would pay the same price for space segment as competing stations and to ensure that competitors have equal access to INTELSAT information. M/A-COM also contends that Comsat has not shown that access to the Staten Island Teleport site is reasonably likely and that such a showing must include a letter from the Port Authority since that entity controls the proposed site. Finally, M/A-COM is concerned that any exclusive arrangements between Comsat and the Teleport could preclude other U.S. carriers from access to that potentially preferred site. It asks that the Commission bar any such exclusive arrangements as being contrary to public policy.

III Discussion

16. Today, we are adopting a Notice of Proposed Rulemaking in the earth station ownership proceeding and are making tentative conclusions as to a new international earth station ownership policy. That proceeding deals with all U.S. earth stations operating with the INTELSAT system. As to IBS earth stations, we find in the NPRM that INTELSAT specifically developed the IBS space segment to allow multiple earth station access and to accommodate user networks through a variety of connectivity arrangements. Multiple earth station access is necessary in order to implement the IBS concept. IBS is designed to provide a wide range of information services quickly to a large user or a community of smaller users in a metropolitan area.

17. In the NPRM, we reject Comsat's proposal for a structured framework for the disposition of applications for IBS facilities. Although Comsat believes that a structured system is necessary to ensure maximum efficiency in IBS, in the NPRM, we find that there is no need for a restrictive plan for granting applications at this time. We believe that the use of IBS capacity should be based upon demand and not some predetermined or otherwise restrictive plan. We see such a plan as inherently anticompetitive.

18. We also propose in the NPRM that Comsat be required to transfer any ownership interests in existing INTELSAT stations from its World Systems Division, which provides monopoly space services, to a separate subsidiary. New earth stations owned by Comsat would also be included in the separate subsidiary.

19. Besides requiring a showing of an applicant's compliance with INTELSAT's technical standards for IBS earth stations, we propose in the NPRM to only consider the minimal legal (citizenship and character), financial (ability to meet the costs of construction and operation), and technical (station location, desired frequencies and types of equipment to be used, hours and modes of operation, etc.) qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 308 and 319. We will also review the frequency coordination and require adherence to the National Environmental Policy Act of 1969, 42 U.S.C. Section 4321 *et seq.* (1980). Absent special problems, the Commission will treat these applications as routine and will seek to expeditiously process them.

20. We find that the subject applications of Comsat meet the legal, financial and technical requirements for IBS earth station ownership and, therefore, should be granted. Comsat is a communications common carrier currently authorized to provide service under the 1962 Satellite Act, and the Communications Act. Comsat's legal and financial qualifications have been previously established. Comsat proposes to build a station which meets the INTELSAT standard E-3 specifications and therefore meets our requirement for compliance with INTELSAT's technical standards. The $1,300,000 construction costs of the station are supported by the application, as are the approximate $700,000 annual operating and maintenance expenses. The proposed station site has already been the subject of an environmental impact study and Comsat's applications do not represent a "major action" under the National Environmental Policy Act of 1969. The proposed frequencies and emissions (and continuous period of operation) comply with Commission and international regulations. The proposed equipment is typical of that employed at such stations. Finally, Comsat has successfully completed coordination with affected terrestrial stations in shared bands.[7]

21. As for the concerns raised in the pleadings, many are addressed by our tentative conclusions and proposals in the NPRM. These include our proposed requirement for the unbundling of Comsat's tariffs (Comsat filed unbundled tariffs for IBS on January 25, 1984 - Transmittal No. 490), our proposal that all of Comsat's earth station services be provided through a separate subsidiary and that the disposition of ESOC investments be determined in a flexible fashion (preferably through negotiations between the Joint Owners) separate from other investments, our decision that IBS stations be entitled to no preferences in regulatory treatment and that these stations be competitive like all others, and our

[7] By its letter received by the Commission February 2, 1984, Comsat requested a waiver of Section 25.203(e) of the Commission's Rules, 47 CFR Section 25.203(e). Consistent with the results of Comsat's coordination efforts, we are granting that request.

rejection of any moratorium period on the acceptance of applications for competing systems.

22. As for the remaining concerns, we reject M/A-COM's contention that Comsat has not shown that access to the Staten Island site is reasonably likely. We believe that Comsat's showing is adequate. We also reject contentions that action on Comsat's applications should be held in abeyance until the earth station ownership proceeding is concluded. INTELSAT is currently providing IBS space segment capacity and we believe it would not be in the public interest to delay the offering of these services to U.S. businesses any longer than necessary. We are also granting, at this time, two other applications for IBS earth stations.[8]

23. The Commission does find, however, that the grant of Comsat's applications should be conditioned on the ultimate outcome of the earth station ownership proceeding and that acceptance of authority to build and operate the station is, therefore, at Comsat's shareholder's own risk. We will require separate accounting for the station in order to make the transfer of the facilities and services to a separate subsidiary more orderly in the future, should we ultimately require such a transfer, and to distinguish the Teleport investment from Comsat's ESOC investments. We will also grant M/A-COM's request and further condition the grant of Comsat's applications with the provision that Comsat not enter into a contract arrangement with Teleport Communications which excludes any other carriers from use of the Teleport site. We find that such a contract would not be in the public interest since Teleport is intended to be a multiple access facility which will be able to accommodate a number of earth station antennas.

24. Upon consideration of the applications, we find that authorization of the requested services and facilities is required by the public convenience and necessity.

25. Accordingly, IT IS ORDERED that application File Nos. CSS-83-P/L and I-P-C-83-067, ARE GRANTED and the Communications Satellite Corporation is authorized, pursuant to Sections 214, 304, 308, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, to construct and operate the proposed station at the Teleport complex, Staten Island, New York, and to establish channels of communication between that facility and appropriate INTELSAT Atlantic Ocean Region satellites for the provision of International Business Services.[9] Before completion of the equipment installation and facility activation, Comsat shall provide to the

[8] *See* applications of International Relay, Inc., File Numbers CSG-84-001-P/L, I-T-C-84-001 (Chicago station), CSG-84-004-P/L and I-T-C-84-024 (New York station).

[9] This authorization is not to be construed as permitting provision of IBS between earth stations located within the United States.

Commission a summary of actual installed equipment. Comsat shall also provide a copy of the site contract entered into with Teleport Communications and the contract shall contain no provisions which exclude any other carriers from use of the Teleport site. Comsat shall also keep a separate account of all costs and revenues associated with the construction and operation of the station.

26. IT IS FURTHER ORDERED that this authorization is specifically conditioned on the Commission's findings and decisions in the proceeding in CC Docket Number 82-540 and that the authorization shall be subject to possible revocation or modification as a result of any findings, rules, requirements or other actions which may result from or be promulgated by that proceeding. The grantee is afforded 30 days from the release date of this order to decline this authorization as conditioned. Failure to respond within this period will constitute formal acceptance of the authorization as conditioned.

27. IT IS FURTHER ORDERED that to the extent specified herein the petition of M/A-COM, Inc. IS GRANTED, and in all other respects IS DENIED.

28. IT IS FURTHER ORDERED that Comsat's request for a waiver of Section 25.203(e) of the Commission's Rules IS GRANTED.

29. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

30. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

Comsat, as Common Carrier
Comsat, Charges and Rate Classifications
International Communications Satellite

Second Memorandum Opinion and Order adopted concerning Comsat's corporate structure and cost allocation practices. Order finds Comsat's current organizational structure to be acceptable but orders modifications to Comsat's cost allocation practices.
—*COMSAT*
CC Docket No. 80-634

FCC 84-128

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Changes in the corporate structure and operations of the Communications Satellite Corporation	CC Docket No. 80-634

SECOND MEMORANDUM OPINION AND ORDER

Adopted: March 30, 1984 Released: April 20, 1984

BY THE COMMISSION:

I. *Introduction and Background*

1. On May 1, 1980, we released our *Comsat Study* in which we analyzed the corporate structure and operating activities of the Communications Satellite Corporation (Comsat) to determine whether any changes were required to ensure that Comsat could effectively fulfill its obligations and carry out its statutory functions.[1] After the release of the *Comsat Study* we initiated a formal rulemaking on Comsat's structure, operating activities and accounting practices. In this order we further refine Comsat's accounting (cost allocation) practices. Below we summarize this proceeding's history, describe the filings since our first order in this docket, analyze the record, and prescribe certain modifications to Comsat's accounting (cost allocation) practices.

[1] Communications Satellite Corporation, 77 FCC 2d 564 (1980) (hereinafter referred to as the *Comsat Study*).

2. We concluded in the *Comsat Study* that the Communications Satellite Act of 1962[2] permits Comsat to engage in activities which are not inconsistent with its statutory mission. We stated that Comsat should not be foreclosed from applying its corporate technology and expertise to the development of new lines of business which would likely contribute to the overall development of satellite technology and which would be in the public interest. However, we found that Comsat's involvement in diversified lines of business raised significant public policy problems. These problems included conflicts of interest resulting from Comsat's involvement in both jurisdictional and nonjurisdictional activities, competitive advantages in nonjurisdictional markets flowing from Comsat's unique status as the U.S. Signatory to INTELSAT and INMARSAT, and potential cross-subsidization resulting from the misallocation of jurisdictional and nonjurisdictional costs.[3]

3. In view of these problems we concluded in the *Comsat Study* that changes were required in Comsat's current corporate structure, its accounting system and the current arrangements for government oversight of Comsat's activities. As to Comsat's corporate structure, we concluded that Comsat should be separated into two distinct corporate elements: one element to handle all jurisdictional (INTELSAT/INMARSAT) activities and one element to handle all present and future nonjurisdictional (non-INTELSAT/INMARSAT) activities. As to Comsat's accounting practices, we concluded that to prevent anticompetitive activities and any evasion of rate regulation, certain accounting requirements coupled with structural separation and arms-length dealings between the separated elements would be appropriate. As to government oversight of Comsat activities, we concluded that such oversight was necessary and should be expanded to protect ratepayers, to assure fair competition, and to prevent conflicts of interest resulting from Comsat's increasing involvement in nonjurisdictional and competitive enterprises.

4. In September, 1980, in response to the *Comsat Study*, Comsat instituted a number of changes to its organizational structure. The major change was to divide the corporation into two elements: (a) a parent organization which included, but was not limited to, jurisdictional activities; and (b) the fully separated nonjurisdictional subsidiaries.[4] Under this

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[2] 47 U.S.C Section 701 (1962) (hereinafter referred to as the Satellite Act).

[3] *Comsat Study*, 77 FCC 2d at 570, 607-676. Jurisdictional refers to Comsat's INTELSAT and INMARSAT activities mandated by the Communications Satellite Act of 1962, as amended, and the INTELSAT Agreements.

[4] The revenues and expenses/costs of separate nonjurisdictional subsidiaries are fully outside of Comsat's statutorily mandated operations. The revenues and expenses/costs of the parent organization – Headquarters Division and World Systems Division (including Comsat Labs) – are allocated between the jurisdictional and the nonjurisdictional activities.

reorganization the parent organization was divided into two segments, the Headquarters Division and the World Systems Division (WSD). The first segment of the parent organization, the Headquarters Division (central staff), was established to provide ultimate policy control over the various divisions of the corporation. The Headquarters Division was also established to provide certain administrative and support functions for the entire corporation. However, the Headquarters Division was not to control the day-to-day operations of the corporation.

5. The second segment of the parent organization, the World Systems Division, was established to perform certain international common carrier functions and related duties in connection with Comsat's role as the U.S. operating entity in INTELSAT and INMARSAT. It also was to perform engineering and research and development in satellite, general telecommunications and electronic product development for the jurisdictional entity, Comsat's affiliates, other commercial entities, government organizations, and INTELSAT/INMARSAT under contract. According to Comsat, the establishment of the WSD increased the corporation's ability to directly assign to its ratepayers those staff and support costs associated with its jurisdictional activities. Since the WSD would perform most of its own administrative, operating and engineering tasks, the costs incurred on behalf of the jurisdictional ratepayer could now be determined with greater precision than was possible when these services were provided by the central corporate staff. The WSD was structured to have three operating units and four administrative groups. The operating units were: (a) International Communications Services (ICS); (b) INTELSAT Technical Services (ITS); and (c) Comsat Laboratories (Comsat Labs).[5] The administrative groups were: (a) Legal; (b) Contracts and Procurement; (c)

[5] ICS was to be the international common carrier segment of the WSD operating under the mandate of the Satellite Act. It was to provide INTELSAT and INMARSAT communications services to United States customers and to participate in related functions, such as technical and operational planning. In particular, ICS was to develop the proposals that Comsat as the U.S. Signatory to INTELSAT and INMARSAT submits to these organizations.

ITS was created to perform technology application and system development services. These services were to be performed exclusively under contract to INTELSAT or INMARSAT.

Comsat Labs were established to conduct research and development relating to satellite and earth station technology. The Labs were also to provide engineering services to the other elements of the WSD, namely, ICS and ITS, and to the nonjurisdictional segments of the corporation. We found in our *Comsat Study* that the Comsat Labs should be located in the nonjurisdictional element of the corporation. In its reorganization Comsat placed the Labs in the element containing its jurisdictional activities. In so doing, Comsat stated that the Labs performed primarily jurisdictional activities.

Finance; and (d) Personnel.[6]

6. The second element established by Comsat contained its nonjurisdictional subsidiaries and partnerships. These wholly owned subsidiaries which engage in competitive activities are Comsat General Corporation (Comsat General), Environmental Research and Technology, Inc. (ERT) and Satellite Television Corporation (STC). Comsat's participation in partnerships, such as Satellite Business Systems (SBS), is also through the nonjurisdictional element. (Since 1980 Comsat's nonjurisdictional activities have expanded and now include Amplica, Telesystems, Compact Software and Intelmet).

7. On October 29, 1980, we released a Notice of Proposed Rulemaking (NPRM) in the captioned proceeding to solicit public comment on the proposed changes in Comsat's corporate structure and operations set forth in the *Comsat Study* as well as on the reorganization implemented by Comsat.[7] Comments were submitted on both topics. Thereafter we released our *First Comsat Structure* order.

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[6] Under the 1980 reorganization, personnel in the WSD's administrative groups were to provide most of the services necessary to carry out Comsat's day-to-day jurisdictional responsibilities. For example, the function of the WSD personnel office was to administer personnel policy for all the WSD units and to coordinate all personnel and salary actions. The WSD financial staff was to maintain all the WSD books of account, handle all customer billings, and make payment to creditors. It was also to comply with all financial reporting requirements and conduct budgeting and financial planning functions. The WSD contracts and procurement staff was to procure materials and services, issue requests for proposals, and administer contracts. The WSD legal staff was to perform the legal services related to day-to-day WSD operations.

[7] 81 FCC 2d 287 (1980). In our Notice of Proposed Rulemaking we reiterated the conclusions found in the *Comsat Study*, noted the pendency of related proceedings and summarized Comsat's reorganization. We then solicited public comment on the structural changes and controls proposed in the *Comsat Study* as well as on the reorganization implemented by Comsat. In response to the NPRM, interested parties submitted filings which reflected a broad range of concerns about Comsat's increasing diversification into non-INTELSAT/INMARSAT activities. Some parties challenged Comsat's legal authority to engage in nonjurisdictional activities. Others requested the Commission to limit these outside business activities. Almost all parties agreed with our assessment that any Comsat business diversification created opportunities for conflicts of interest, misallocation of costs and anticompetitive behavior.

Among the principal concerns raised by the parties was the ability of Comsat to engage in non-INTELSAT/INMARSAT activities without compromising or abusing its role as the U.S. Signatory to INTELSAT and INMARSAT to gain advantages for its subsidiaries in competitive markets. Parties questioned whether Comsat's involvement in satellite equipment manufacturing would compromise its ability to exercise independent judgment in evaluating hardware procurement proposals for the international satellite system. Parties also questioned whether Comsat's ownership of affiliates would compromise its ability to fully represent the interests of the U.S. international carriers in INTELSAT and whether anticompetitive conduct by Comsat could effectively be prevented through structural, accounting, information flow and arms-length dealings requirements. In response to these concerns, Comsat averred that its new corporate structure and steps taken in the areas of

8. In our *First Comsat Structure* order[8] we reaffirmed our conclusion from the *Comsat Study* that Comsat is permitted under the Satellite Act to engage in activities which are not inconsistent with its statutory mission.[9] We stated that the public would benefit from Comsat's applying its expertise in diversified businesses so long as certain regulatory concerns were adequately addressed. We accepted Comsat's decision to retain the Comsat Labs in the parent organization even though this was contrary to our proposal in the *Comsat Study* to locate the Labs in the nonjurisdictional element. This acceptance was based on our belief that allocation procedures could be implemented to accurately apportion shared Lab costs between the jurisdictional and nonjurisdictional elements. We then analyzed the steps taken and proposed by Comsat to resolve the cost allocation and information flow problems. We concluded, as summarized below, that the measures instituted by Comsat fell short of satisfying our concerns. We therefore mandated certain changes and required Comsat to report back to us on how it would implement these accounting modifications.

9. As to Comsat's allocation practices, we found Comsat's method of apportioning research and development expenses and capital costs between its competitive and jurisdictional elements to be inadequate and deficient. We identified three areas in which Comsat's existing methodology to allocate shared costs between jurisdictional and nonjurisdictional accounts was deficient. These categories covered: (a) shared research and development capital costs; (b) shared research and development expenses; and (c) shared administrative and support expenses.[10] We specifically questioned Comsat's continued use of a formula which placed 75 percent of the capital costs for research and development at the Labs in its rate base. We further questioned Comsat's use of the "primary benefitting entity" test to allocate common research and development expenses between jurisdictional and nonjurisdictional accounts. In questioning both of these accounting procedures we found that their use was placing an unnecessary and unfair burden on the Comsat ratepayer. However, we

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cost assignment and dissemination of INTELSAT/INMARSAT information would provide a discrete cost center for its INTELSAT/INMARSAT activities and reduce the potential for any misallocation of costs or anticompetitive conduct.

[8] Changes in the corporate structure and operations of the Communications Satellite Corporation, 90 FCC 2d 1159 (1982) *recon. denied*, 93 FCC 2d 701 (1983), *appeal dktd. sub nom.* RCA Global Communications, Inc., et.al., v. FCC, case No. 83-1662 and consolidated cases (D.C. Cir., June 16, 1983) (hereinafter referred to as *Comsat Structure* or *First Comsat Structure* order).

[9] *Id.* at 1171-72.

[10] At the time of the *First Comsat Structure* order our examination of Comsat's cost allocation practices had not yet revealed problems with the corporation's treatment of shared administrative and support capital costs.

indicated a willingness to permit the Labs to remain within the parent organization if an accounting and reporting system could be expeditiously developed which properly identified and allocated research and development costs. Additionally, we questioned Comsat's existing methodology (three factor formula) for allocating the expenses of shared general and administrative and support services. We again required Comsat to expeditiously propose revisions to its accounting practices in order to remedy the identified deficiencies.[11] Finally, we directed Comsat to submit its accounting and cost allocation proposals to independent auditors for evaluation as to whether the proposals satisfied our concerns.

10. In the area of information flow, we indicated our concern with Comsat's access to INTELSAT/INMARSAT information and the possible intracorporate transfer of this information to its various competitive ventures. We stated that a competitive advantage could flow from Comsat's access (or "leadtime" access) to INTELSAT Board of Governors documents, INTELSAT facilities planning documents, and inventions and technical data which arise out of or are utilized in work performed at INTELSAT's or INMARSAT's expense. We therefore adopted general guidelines and delegated authority to the Common Carrier Bureau to broaden public access to INTELSAT and INMARSAT information while at the same time protecting documents under the Freedom of Information Act which merit confidential treatment.[12]

11. Pursuant to the *First Comsat Structure* order, Comsat filed a report outlining its cost allocation changes, the Commission and Comsat exchanged letters, interested parties submitted comments, Comsat filed additional information, and the staff reviewed Comsat's accounts and records. Below we outline these reports, letters and other filings as well as the staff's examination. Thereafter we analyze the record, reach certain conclusions as to Comsat's structure and cost allocation practices, and require the implementation of specific cost allocation procedures by Comsat to more fully protect ratepayers and ensure fair competition.

II. *Reports and Correspondence Subsequent to the First Comsat Structure Order*

A. *Comsat's Report*

12. In response to our directives in the *First Comsat Structure* order, Comsat submitted on January 24, 1983, a report proposing certain changes in its cost allocation practices. Comsat's proposals for assigning certain expenses and capital costs associated with shared general and administrative (G&A) activities and shared research and development (R&D) projects included the use of direct assignments to particular

[11] *Comsat Structure* at 1174-1181.

[12] *Id.* at 1184-1194.

divisions/projects, special factors and general allocation formulas. Below we describe the cost allocation proposals submitted by Comsat for the: (a) allocation of expenses for shared G&A services; (b) allocation of expenses for shared R&D projects; and (c) allocation of capital costs for shared R&D projects.[13]

13. *Allocation of expenses for shared G&A services.* In its 1980 reorganization Comsat established a Headquarters Division to provide, in part, G&A support services for all of the corporation's divisions, both jurisdictional and nonjurisdictional. Since the Headquarters Division (and only the Headquarters Division) was providing G&A support services to other divisions, both jurisdictional and nonjurisdictional, it was necessary to establish an accounting system to allocate the costs of providing these support services to the appropriate jurisdictional or nonjurisdictional account.[14] The system that Comsat established to allocate G&A expenses generated by the Headquarters Division between the jurisdictional and nonjurisdictional accounts permitted three staff groups within this division — Legal, Corporate Development, and Secretary — to directly charge expenses to specific projects within a line of business that benefitted exclusively from the work done. These employees could not broadly assign expenses to an entire division or a line of business. All other shared expenses incurred by these three staff groups which did not benefit a particular project in a line of business were placed in a residual pool. Most of the other staff segments within the Headquarters Division assigned their time to the same residual pool which then was allocated between jurisdictional and nonjurisdictional accounts through the three factor "activity" formula.[15]

14. Comsat now proposes in its report that all of its Headquarters staff be permitted to directly charge expenses to a specific project (task) or to assign expenses to a division or line of business. Comsat also proposes that certain expenses within its Headquarters Division be allocated by means of special factors rather than by means of project identification or an activity formula. These special factors were, according to Comsat, chosen to better reflect the cost/benefit relationships of these staff members to the corporation. For example, Comsat proposed the use of a "personnel count" as the special factor for allocating Human Resources, Payroll, and Trust Fund Administration staff expenses because these staff members provide services directly to employees.

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[13] Comsat did not address the issue of allocation of capital costs for shared G&A services.

[14] When a cost is charged, assigned or allocated to a jurisdictional account it becomes part of the regulated entity's revenue requirement.

[15] The three factor formula utilized by Comsat to allocate residual expenses not directly charged, assigned or allocated by means of certain special factors averages salary, operating revenues, and certain capital assets to measure the "activity" of Comsat's corporate elements and to allocate shared costs on this basis.

Further, it proposed "assets" as the special factor for allocating certain Financial and Stockholder Meeting staff expenses because Comsat claimed that these employees are primarily concerned with protecting the assets of the corporation. Finally, Comsat proposes to use a ratio based on operating expenses rather than the three factor formula to allocate shared G&A expenses to the Satellite Television Corporation (STC).

15. *Allocation of expenses for shared R&D projects.* Comsat R&D, which is primarily conducted at Comsat Labs, is currently classified by Comsat into two broad categories: corporate initiated and customer initiated. Corporate initiated R&D is originated by corporate management, both jurisdictional and nonjurisdictional, and is the source of a large percentage of the R&D projects at the Labs. Customer initiated R&D is originated by specific entities, either internal (Comsat General, for example) or external (INTELSAT, for example). Comsat now assigns the great majority of all corporate initiated R&D projects to the jurisdictional account on the theory that the ratepayer is the "primary benefitting entity" of the work. Comsat calls corporate initiated R&D projects wholly assignable to the ratepayer "Category I" R&D. Since 1980, Comsat has initiated a few corporate R&D projects solely to provide additional support for its commercial ventures. Comsat calls these projects "Category II" R&D and has charged their expenses to the nonjurisdictional side of the company. Comsat calls customer initiated R&D, whether for nonjurisdictional or jurisdictional elements, "Category III" R&D. The costs for this category are assigned according to the identity of the customer.

16. In response to our request for a detailed justification for the inclusion of research and development expenses in jurisdictional accounts, Comsat proposed a new allocation scheme and provided task descriptions for three types of R&D projects that it stated should be wholly or partially funded by the jurisdictional ratepayer. The first type includes Category III R&D projects performed at the request of certain lines of business within the WSD (such as ICS or ITS). Comsat proposes that these customer initiated projects be wholly funded by the ratepayer because they are initiated by jurisdictional entities. The second type includes Category I and II R&D projects initiated at the request of the corporate staff. Comsat states that a portion of these corporate R&D projects should be charged to the jurisdictional ratepayer by means of a matrix formula.[16] The third group of projects consists of Category III R&D work

[16] Comsat describes the "matrix" approach as follows. First, Comsat would take all of its R&D projects in its corporate (Category I and Category II) programs and assign them individually to one of six broad classes. These classes are: (1) Earth Segment, (2) Space Segment, (3) Systems and Services, (4) Other Physical Sciences and Technology, (5) Monolithic Microwave Integrated Circuits (MMIC) and Other Related Technology Development, and (6) Other Software. Comsat then would evaluate the benefits of work in these six classes in relation to the present and planned activities of each of its lines of

done under contract for INTELSAT, INMARSAT or the U.S. government. Comsat states that all of the expenses associated with this type of R&D should be included in its jurisdictional revenue requirements. Of course, these latter expenses would be partially offset by revenues received from the entity which let the contract to Comsat.

17. *Allocation of capital costs for shared R&D.* In the *Comsat Structure* order we questioned the current arrangement under which Comsat allocates 75 percent of its capital costs for plant and equipment in Comsat Labs to its jurisdictional rate base.[17] We stated that such a high percentage may no longer be reasonable in light of Comsat's expanded efforts to develop and market nonjurisdictional products and services. In its report, Comsat proposed to implement an allocation formula or ratio that it stated more fairly reflected the changing nature of the corporation.

18. This ratio assigns to the jurisdictional rate base a percentage of all capital costs related to R&D based on previously determined R&D expense allocations. The denominator of this ratio is the sum of the expenses incurred by the Labs. The numerator is the sum of three expense items which Comsat considers to be jurisdictional. The first expense item in the numerator is the dollar amount of corporate initiated (Category I and Category II) R&D expenses derived under the "matrix" approach and attributable to the ratepayer. The second expense item in the numerator is comprised of the expenses incurred by the Labs in performing INTELSAT, INMARSAT, and U.S. government contracts (Category III). The third part of the numerator includes the expenses incurred by the Labs in connection with work done for the WSD (Category III).

B. *Assessment of Independent Auditors*

19. In the *Comsat Structure* order, we required Comsat to obtain from independent auditors an assessment of the extent to which its proposed cost allocation methodology comported with the guidelines and policies enunciated in that order. Through this mechanism, we sought to

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businesses. If Comsat concludes that a line of business cannot benefit from one or more of these R&D classes, it would assign no costs whatsoever arising from that class or classes to that line of business. Instead, it would restrict the apportionment process to those lines of business that Comsat believes can benefit from that class of research. Next, Comsat would use an activity formula to apportion the expenses within each class of R&D expenses among the benefitting lines of businesses. For this formula, Comsat would use salaries, operating revenues, and certain capital assets –the same three factors Comsat proposed for use in allocating shared residual G&A expenses.

[17] Our staff examination indicates that Comsat is currently using other fixed percentages for the allocation of certain Lab assets and other common corporate equipment and property. It now allocates 100 percent of its computer facilities which are used by the entire corporation and 68 percent of its Headquarters plant (building and contents) to its jurisdictional rate base.

obtain an unbiased opinion from an outside auditing expert. Comsat, however, did not submit its proposed methodology to an independent auditor for full evaluation. Rather, it obtained from its regular auditing firm only a very limited opinion on certain minor aspects of its methodology. Although Comsat stated that it recognized its proposals were "not wholly consistent with the letter of the *Comsat Structure* guidelines," it stated that its proposals fully achieved "the Commission's underlying objectives" and that submission of its proposals to outside auditors was not required.[18]

C. *Commission Response*

20. By letter dated March 31, 1983, we transmitted to Comsat our concerns regarding the suitability of its cost allocation proposals. We stated that the proposals did not conform with many of the requirements and policies enunciated in the *Comsat Structure* order, especially those relating to the equitable allocation of expenses and capital costs in shared G&A and R&D functions. We describe these concerns more fully below. We also noted that Comsat had failed to comply with our explicit directive that it submit its proposals to an independent auditor.

21. In our letter we first affirmed our rejection of the three factor formula as unsuitable to measure the "activity" and allocation of certain shared G&A expenses. It appeared that this formula did not fully reflect the corporate resources being employed by Comsat's new business ventures. Second, we questioned the use of special allocation factors for items otherwise earmarked for the residual G&A expense pool. Third, we addressed the allocation of shared R&D expenses and capital costs for Comsat Labs. We were concerned that Comsat's proposal allocated an unreasonably high percentage of both the Labs' expenses and associated capital costs to jurisdictional ratepayers.[19]

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[18] Comsat report submitted January 24, 1983, at 22, n. 34.

[19] Specifically, as to allocation of R&D expenses for the Labs, we found Comsat's use of the "matrix" approach unacceptable for several reasons. First, Comsat had provided no adequate justification to support the inclusion of the WSD line of business in the allocation formula as benefitting from each of the six classes of R&D expenses. Second, Comsat did not provide adequate justification for the exclusion of various competitive lines of business from the allocation formula. Third, Comsat presented no new facts to warrant reconsideration of our earlier decision rejecting its use of the three factor formula to apportion residual expenses, which would include those relating to common R&D.

We also criticized the inclusion in jurisdictional accounts of expenses associated with R&D contracted for by INTELSAT and INMARSAT. Such contracts are voluntarily entered into by Comsat as a competitive vendor of services, and as such are not related to Comsat's jurisdictional mission under the Communications Satellite Act of 1962. We determined that the expenses and capital costs associated with these contracts were to be recovered by Comsat directly from INTELSAT, INMARSAT, or the U.S. Government, as

22. In our letter, we gave Comsat another opportunity to develop a cost allocation policy that satisfied the concerns we had identified. We also requested additional information regarding auditing criteria, reporting requirements, and the rationale for the selection of the particular special factors Comsat had proposed. We did not, however, require that Comsat submit its new proposal to independent auditors because we believed such requirement would engender additional delays in resolving the issues in this docket. Instead, we opted to devote additional staff resources to the analysis and evaluation of Comsat's new proposals. We also did not insist that Comsat submit a proper auditor's report for its original proposal, as the staff had already done a full analysis of that proposal in the preparation of the letter to Comsat.

D. *Comsat's Reply*

23. On May 9, 1983, Comsat responded to our letter of March 31, 1983, with a supplemental report.[20] In its response Comsat presented new proposals and supporting documentation which its stated addressed our concerns. We summarize below Comsat's supplemental report.

24. *Allocation of expenses for shared G&A.* In its submission Comsat addressed our concerns relating to the continued use of the three factor formula to allocate shared G&A expenses within the residual pool. Comsat proposed to replace its three factor formula with a new formula which would be based on "expenditures."[21] In selecting "expenditures" as the basis for its general formula, Comsat stated that this formula would fairly allocate shared G&A expenses. Comsat also stated that a formula

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the case may be, and not directly from its jurisdictional ratepayers. Jurisdictional ratepayers indirectly help fund INTELSAT and INMARSAT R&D contracts (whether given to Comsat or to other R&D vendors) because of Comsat's ownership position in INTELSAT (24 percent) and INMARSAT (23 percent).

As to allocation of R&D capital costs for the Labs, we expressed similar concerns. Comsat's proposal did not provide the detailed justification that we had required on the "used and useful" relationship of the Labs' capital costs to the jurisdictional ratepayers. Specifically, we criticized Comsat's approach because it allocated R&D capital costs under the same formula by which it allocated R&D expenses. As previously noted, we found this formula flawed. For instance, we said that to the extent that Comsat's capital cost allocation formula for the Labs relies on the "matrix" approach, it had the same flaws we had noted for its use to allocate R&D expenses. Similarly, we said that to the extent that it relies on using expenses associated with contractual R&D (such as INTELSAT or INMARSAT), it was improper. We indicated that, as with R&D expenses, the capital costs of the Labs' plant and equipment incurred under contract should be recovered from the organization awarding the contract.

[20] Supplemental Report on Allocation of Shared Services and Comsat Labs, submitted May 9, 1983.

[21] Expenditures are current operating expenses less depreciation plus total capital costs expended in a year.

which used operating expenses,[22] which we had earlier suggested as a possible basis for allocating shared G&A, would result in an allocation of expenses to its World Systems Division which would be unreasonably low compared to the allocation using "expenditures" -specifically, 55.6 percent as compared to 66.5 percent. Comsat argued that 66.5 percent funding by the WSD of shared Headquarters Division expenses was appropriate given the benefit of this division's efforts to the WSD. Comsat also argued that use of current operating expenses would be improper because it takes into account corporate property through historical depreciation rather than through total cash outlays. Comsat argued that property measurements based on current cash outlays more accurately track corporate Headquarters efforts and related benefits than measurements based on depreciation. As a final matter, Comsat stated that whether an allocation formula is based on current operating expenses or on some other factor, SBS should not be charged with any portion of Headquarters costs. In support of this proposal Comsat stated that the amount of Headquarters effort expended in support of SBS was minimal and therefore allocation of this effort was not required.

25. In its reply, Comsat further explained its proposal to use special allocation factors for certain shared G&A expenses within the Headquarters Division. For Personnel and Trust Fund Administration expenses, Comsat proposed a formula which would count the number of persons in its World Systems Division and subsidiaries and allocate expenses based on this count. However, this personnel count would not include the employees in the Headquarters Division or in SBS. Thus, the numerator of this ratio for the jurisdictional share of these expenses would be WSD employees. The denominator of this ratio would be total Comsat employees, less SBS and Headquarters Division personnel. For Common Stock and certain Finance related expenses, Comsat proposed to use the assets of its World Systems Division and the assets of its subsidiaries in deriving an apportionment formula. Again, except for the Common Stock expense allocation, Comsat would not include its investment in SBS in this apportionment formula.

26. *Allocation of expenses for Shared R&D.* In its filing Comsat reiterated its proposal that three types of R&D expenses be considered wholly or partially jurisdictional: (a) Category III expenses generated by WSD requests; (b) Category I and Category II R&D expenses initiated by corporate management; and (c) Category III expenses incurred in connection with certain outside contracts. Although Comsat no longer argued that outside contracts with commercial entities should be jurisdictional, it still proposed to include INTELSAT, INMARSAT, and most U.S. govern-

[22] The "operating expenses" formula that we proposed for study includes all cash expenses plus depreciation expended in a year for operations.

ment contracts in its jurisdictional revenue requirements.[23]

27. *Allocation of capital costs for shared R&D projects.* In its first (January, 1983) report, Comsat took the position that the portion of the Labs' net capital costs properly includable in the jurisdictional rate base should be the percentage that results from dividing legitimate jurisdictional R&D operating expenses by total jurisdictional and nonjurisdictional R&D operating expenses.[24] In its second (May, 1983) proposal Comsat states that the ratio should be based on jurisdictional R&D "expenditures" divided by total R&D "expenditures."

E. *Comments on Comsat's Reports*

28. By public notice dated on May 13, 1983, we solicited comment on the January 24, and the May 9, 1983 reports submitted by Comsat.[25] M/A-COM, Inc. (M/A-COM) and RCA Global Communications, Inc. (RCAG) filed comments to which Comsat replied. These pleadings are summarized below.[26]

29. *M/A-COM Comments.* M/A-COM objected to Comsat's use of the "expenditures" formula for allocating corporate R&D and residual G&A expenses. While M/A-COM found that the use of the "expenditures" formula resulted in some improvement over the earlier "three-factor" formula, M/A-COM asserted that it would continue to distort results. In M/A-COM's view, neither additions to property (through expenditures) nor depreciation (through operating expenses) should be included in the allocation factor, since neither adequately reflects current activity. Moreover, M/A-COM stated that use of either additions to property or

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[23] Comsat proposed to include 100 percent of WSD initiated R&D expenses and 100 percent of most contractually generated R&D expenses in its revenue requirements. As to corporate R&D expenses, Comsat again proposed to allocate these expenses between jurisdictional and nonjurisdictional segments based on activity, though with a new formula for measurement of activity, using the single factor of "expenditures." Comsat again objected to the use of the single factor of "operating expenses" for allocating common R&D expenses on much the same grounds that it objected to the use of this factor for the allocation of shared G&A expenses. First, it argued that research and development effort is driven by the current and, possibly, future activities of the corporation, not by past activities. Therefore, total cash outlays is a better measurement of benefit as reflected in property rather than depreciation. Second, it claimed that the bottom line results of the "expenditures" approach to R&D expense allocation "are more consistent with the basic purpose of the Corporation and the importance of its jurisdictional activities," than would be the results of alternative approaches.

[24] Comsat argued that the following types of R&D efforts be considered jurisdictional for this purpose: (1) WSD tasking to the Labs, (2) certain outside contracts with the Labs, and (3) the jurisdictional portion of corporate initiated R&D derived from the matrix formula.

[25] Public Notice, Mimeo. No. 4156.

[26] We shall grant M/A-COM's request that its earlier filed comments (March 11, 1983) be incorporated by reference into its comments filed pursuant to our Public Notice.

depreciation would unwisely encourage Comsat as a monopoly supplier of international satellite circuits to overinvest and expand its rate base in order to increase its allowed return to investors. M/A-COM avers that a "cash expenses" formula would provide a better measure of current activity in Comsat's business segments.[27] Such a formula would better reflect day-to-day business activity since it would not be distorted by the "lumpy" nature of investment in satellite telecommunications.

30. M/A-COM also argues that Comsat has not yet shown convincingly that the "matrix" approach is truly an objective and auditable method of allocating R&D costs. Thus, M/A-COM requested that Comsat be required to supplement the record with substantially more information about both its corporate R&D projects and customer directed R&D projects to enable interested parties to make reasoned judgments on the "matrix" approach.[28] As to the information which Comsat had already submitted, M/A-COM claimed that a number of the exclusions Comsat proposed for its competitive business segments were unreasonable.

31. In addition, M/A-COM urged the Commission to reject any formula to allocate shared R&D expenses that would give ownership rights in R&D patents or data to Comsat's affiliates if such rights would enable these affiliates to gain preferential access to ratepayer funded R&D. M/A-COM asserted that when ratepayer funding is involved, Comsat's competitors should be accorded the same access to the resulting patents or data as Comsat's affiliates. M/A-COM also argued that the arm's-length relationship between the WSD and Comsat affiliates should be strengthened insofar as the use of Comsat Labs' services is concerned. M/A-COM seeks a prohibition on the sharing of R&D and technological know-how, and a prohibition on the transfer of research scientists and engineers from Comsat Labs to Comsat's competitive affiliates.

32. *RCAG Comments.* RCAG also criticized Comsat's proposals for allocation of shared G&A and R&D expenses. RCAG offered three reasons why "expenditures" is not an appropriate method to allocate residual G&A expenses. First, "expenditures" results in an unreasonably large allocation of shared costs to the jurisdictional ratepayer. Second, since "expenditures" reflects all types of cash outlays, the use of this factor results in an unreasonably high allocation of residual costs to those corporate segments which disburse payments to contractors for "turnkey-type" construction projects requiring minimal headquarters supervision. As an example, RCAG cited Comsat's payments to INTELSAT to finance satellite system acquisition. Third, Comsat's proposal to allocate only 0.3

[27] Cash expenses are current operating expenses less depreciation.

[28] Comsat later provided additional information about its corporate initiated Category II and customer initiated Category III nonjurisdictional R&D projects but requested confidential treatment of the information under the Freedom of Information Act (FOIA).

percent of shared G&A costs to SBS is unreasonably low in view of the magnitude of Comsat's investment and involvement in SBS.

33. RCAG also argued that Comsat's proposed approach for allocating the expenses and capital costs of the Labs to jurisdictional accounts is flawed and contrary to Commission directives. In particular, RCAG stated that Comsat has ignored our directive in the *Comsat Structure* order to exclude INTELSAT and U.S. government contracts in determining jurisdictional expenses and its rate base. RCAG maintained that since these contracts are not perceptibly different from commercial contracts they should not be treated differently. Since Comsat now concedes that commercial contracts are not jurisdictional, RCAG sees no reason why Comsat should be allowed to treat INTELSAT and U.S. government contracts as jurisdictional. Rather, RCAG believes that the expenses and costs of investment associated with these contracts should be reflected in the prices paid by INTELSAT and the U.S. government. RCAG criticized Comsat's rationale for such inclusion – the enhancement of U.S. leadership in satellite technology, the protection of U.S. investment in INTELSAT, and the promotion of Comsat's corporate objectives – as inadequate to justify ratepayer subsidization of contract revenue shortfalls. Finally, RCAG argued that SBS benefits from the research performed at the Labs and therefore should be required to bear a substantially greater portion of total amount of R&D expenses and capital costs.

F. *Comsat's Reply*

34. In its reply, Comsat responded to M/A-COM's argument that its expenditures formula did not properly reflect current corporate activity. First, Comsat stated that its proposed "expenditures" formula would more accurately allocate shared costs than the "cash expense" formula proposed by M/A-COM. Second, Comsat stated that capital investment as reflected in "expenditures," is an important aspect of certain Headquarters staff segments, including the Finance, Corporate Affairs, and General Counsel groups, and should accordingly be part of the general formula. Third, Comsat stated that "expenditures" reflects staff effort at the time of investment and not at the time of depreciation and is therefore preferable to a formula based on current operating expenses."

35. Comsat also responded to the contention that SBS is not assuming its fair share of common costs. Comsat argued that there is now in place a system for the direct charging to SBS (through a Comsat subsidiary) of all costs associated with corporate staff effort undertaken on behalf of SBS. Comsat also reiterated that the amount of corporate staff effort expended in support of SBS is "minimal."

36. Comsat also addressed M/A-COM's comments regarding the reasonableness of certain exclusions of nonjurisdictional segments in the "matrix" formula. As to the exclusion of Comsat's Technology Products

(Amplica and Telesystems lines of businesses) from paying a share of the costs of the Other Physical Sciences and Technology class of R&D projects, Comsat stated that Technology Products received only minimal benefit from this class of R&D. Comsat also made the same argument for exclusion of ERT from the costs of Physical Sciences projects.

37. Finally, Comsat addressed the issue of the inclusion of INTELSAT and U.S. government contracts in the jurisdictional accounts. Comsat reiterated its view that "all relationships with INTELSAT are jurisdictional," that government contracts obviate the need for ratepayer funded corporate R&D, and that its practice of considering both INTELSAT and government contracts as jurisdictional activities is fully consistent with its obligations to perform research and development in furtherance of the purposes and objectives of the Satellite Act.

G. *Bureau Letters to Comsat*

38. Subsequent to Comsat's reply filing, the Chief, Common Carrier Bureau, requested additional information from Comsat on certain aspects of its current organization and proposed accounting practices. Comsat replied to these questions on July 1, 1983. Comsat also provided additional information in response to later Bureau requests. Information submitted by Comsat related to its organization, staff areas of responsibility, existing accounting practices, contracts, and corporate and government R&D projects.

H. *Staff Examination of Comsat's Records and Books of Accounts*

39. On August 9, 1983, the Common Carrier Bureau staff initiated an on-site examination of Comsat's accounts and supporting records. The purpose of this examination was to review Comsat's allocation of expenses and capital costs between jurisdictional and nonjurisdictional accounts. This examination was substantially completed by the end of September 1983.

40. The staff reviewed numerous corporate material, including the corporation's Board of Directors' Minutes, the subsidiaries' Boards of Directors' Minutes, materials submitted to the above Boards (including the President's Report), minutes of various Board Committees (Research and Development, Finance, Direct Broadcast Satellite, Internal Auditing), and materials relating to various SBS partnership committees. The staff also examined materials relating to Comsat Labs, including the 1983 Corporate R&D task descriptions, a 1983 Capital Equipment Purchases memorandum, and various Laboratory business plans. In addition, they examined portions of the business plans of Comsat's subsidiaries. Finally, they examined such other items as SEC filings, Comsat annual and quarterly reports, various Comsat publications, computer printouts listing

employee names, organization, time charged and other materials indicating the manner in which Comsat is currently allocating common expenses and capital costs.

III. *Discussion*

A. *Overview*

41. Our decisions to permit Comsat to engage in non-INTELSAT/INMARSAT ventures have been accompanied by a public interest determination that the initiation of such competitive activities must be coupled with certain structural, accounting and information flow modifications within Comsat. In this *Second Comsat Structure* order we review Comsat's existing structure and accounting practices. We permit Comsat's existing structural organization to continue. However, we do require modification of Comsat's cost allocation practices to more fully protect the users of Comsat's monopoly services.[29]

42. As to Comsat's structure, we shall permit Comsat to retain its Headquarters and World System Divisions (including the Comsat Labs) within the parent company. However, we will continue to monitor this structural arrangement in order to determine whether the economies of scale created by this structure outweigh the potential risks of ratepayer subsidization of competitive ventures or anticompetitive practices that we identified in the *Comsat Study.* As to Comsat's cost allocation practices, we find it necessary for Comsat to implement more specific practices for the allocation of shared capital costs and expenses between jurisdictional and nonjurisdictional accounts. There can be no doubt that the only costs properly attributable to the rate base and revenue requirements for INTELSAT and INMARSAT services are those costs directly attributable to those statutory services. Since neither Comsat's existing Headquarters Division nor its World Systems Division is exclusively devoted to jurisdictional tasks, expense and capital cost allocation practices must be further developed which permit Comsat to place in its regulated accounts only that portion of its Headquarters and WSD costs which represent actual expenditures in fulfillment of its statutory mission. Below we discuss Comsat's structure and cost allocation proposals, make certain conclusions, prescribe certain modifications to Comsat's cost allocation practices, and explain the bases for these actions.

B. *Structure*

43. In our *First Comsat Structure* order we affirmed our *Comsat Study* determination that Comsat could engage in nonjurisdictional

[29] In the area of information flow, by letter dated March 30, 1984, the Bureau reviewed Comsat's various proposals and required the implementation of certain procedures to broaden public access to INTELSAT/INMARSAT documents.

activities that were not inconsistent with its statutory mission and established the basic parameters of Comsat's structural organization. Recognizing the possibilities of conflicts of interest, misallocation of costs, and anticompetitive behavior we conditioned Comsat's continuation of nonjurisdictional business ventures on the establishment of a corporate structure which substantially separated its jurisdictional and nonjurisdictional activities. We stated our tentative approval of a structure wherein the jurisdictional entity had officers, operating and support personnel, facilities and records/books of accounts separate from the nonjurisdictional divisions, subsidiaries or affiliates. However, we tentatively permitted, for efficiency reasons, the sharing of certain limited common facilities and personnel, including Comsat Headquarters and Laboratories.

44. Upon review of the record, we reaffirm our previous conclusion that Comsat's participation in non-jurisdictional activities which are not inconsistent with its mission under the Satellite Act and INTELSAT Agreements may contribute to the overall development of satellite technology and is, therefore, in the public interest.[30] We also find Comsat's corporate structure to be generally acceptable. In view of the promised increased efficiencies and the implementation of improved cost allocation procedures, we will permit Comsat to retain within the parent company both jurisdictional and nonjurisdictional activities. We emphasize that this structural arrangement is satisfactory only because we believe that a cost allocation system can be implemented which will protect ratepayers from bearing the costs of Comsat's nonjurisdictional activities.

45. In our *First Comsat Structure* order we required Comsat to provide us 90 days notice prior to any change in its existing corporate structure. However, the Bureau determined during its on-site examination that Comsat had instituted a number of corporate changes without informing us in advance. Some of these changes involved the granting of increased responsibilities to the Headquarters Division. The Headquarters Division now performs additional tasks directly for Comsat's subsidiaries (e.g., Comsat General has no internal legal staff but relies wholly on Headquarters staff for legal support). The Bureau also found that certain functions formerly performed by the staffs of the subsidiaries (e.g., accounting and preparation of Management Information Systems software) were now being performed by the Headquarters Staff. Comsat states in its filings that this expansion of the Headquarter's functions and staff (from about 225 in 1981 to over 400 in 1983) is necessary to increase

[30] While we reaffirm here Comsat's ability to engage in nonjurisdictional activities that are not inconsistent with its mission under the Satellite Act and INTELSAT Agreements, we must express our concern about the financial viability of one or more of these activities and the potential economic impact that such activities can have on charges to jurisdictional ratepayers.

corporate efficiency. It argues that both its jurisdictional and nonjurisdictional elements benefit from the associated cost savings to the corporation from this consolidation. Because we have only recently become aware of these matters, we shall direct the staff as part of its oversight function to monitor these changes in order to evaluate benefits and costs to the ratepayers as well as their impact on allocation formulas.[31]

46. Since 1980 Comsat has also modified the relationship of the WSD to the rest of the corporation. Based on our examination of the WSD's current operations, it is clear that this entity now has substantial nonjurisdictional responsibilities. In addition to performing nonjurisdictional contracts for various outside organizations, it has provided and continues to provide engineering and administrative support to nonjurisdictional Comsat affiliates. This support has included the provision of financial, procurement, accounting, and personnel support functions for these affiliates. Although the WSD has received some reimbursement for this support, we are not convinced that the amount of reimbursement has been adequate to cover the WSD's fully allocated costs. We therefore again direct the staff to monitor as part of its oversight function the WSD's modified role, with particular attention to assuring that the WSD's support for nonjurisdictional affiliates is fully reimbursed.

C. *Cost Allocation Practices*

47. Comsat's role under the Satellite Act is to establish, in conjunction and in cooperation with other countries, a global communications satellite system. In carrying out this task Comsat is authorized in Section 305 of the Satellite Act to: (a) plan, initiate, construct, own, manage and operate by itself or in conjunction with foreign governments or business entities an international commercial communications satellite system; (b) furnish for hire channels of communication; and (c) own and operate international earth stations. To accomplish these purposes Comsat is authorized to: (a) conduct or contract for research and development related to its mission; (b) acquire necessary facilities and equipment; and (c) purchase launch services, sell satellite services, and develop technical specification plans for the satellite system. In 1971 the United States and Comsat signed the INTELSAT Agreements which established the INTELSAT system and

[31] We particularly direct the staff to monitor Comsat's cost allocation mechanisms to make sure that jurisdictional ratepayers do not bear any costs for Headquarters efforts not beneficial to them. Monitoring is particularly appropriate in areas where the WSD maintains its own internal staff (e.g., legal and business development) but where Comsat affiliates have little or no internal staff and thus rely on corporate Headquarters staff for actual day-to-day operations.

defined the relationship between the system and each signatory.[32] We view the INTELSAT Agreement and Section 305 of the Satellite Act as giving the Commission broad latitude in defining Comsat's mission. Thus, depending on the state of development of a global satellite system, Comsat's mission may expand or contract. Prior to the establishment of INTELSAT, and during this organization's infancy, we viewed Comsat's mission as quite broad. It owned and operated an international system and later became the manager of INTELSAT. During this period we did not object to Comsat's engaging in a broad range of R&D projects, assigning most costs to the jurisdictional ratepayer. Now, however, circumstances have changed and a more restrictive view of Comsat's mission is appropriate. First, the INTELSAT system has developed into a reliable and stable source of global communications facilities and services. Second, under the INTELSAT Agreement, INTELSAT now owns and operates the international system and conducts its own R&D. We believe that the maturation of the INTELSAT system and the development of a separate INTELSAT staff to operate and manage the global system are particularly important changes. Thus, Comsat is now just one of over 100 signatories whose obligation is to provide service to U.S. entities, to participate in the INTELSAT decision making process, and to invest in the global system in proportion to its ownership share.

48. Below we analyze the extent to which Comsat's cost allocation practices accurately reflect its current mission. Our analysis covers Comsat's cost allocation practices for: (a) G&A expenses; (b) R&D expenses; (c) R&D capital costs; (d) G&A capital costs; and (e) other miscellaneous costs.

1. G&A Expenses

49. *Direct G&A Expenses:* Comsat has developed an extensive listing of descriptions applicable to all of the tasks performed by the corporation in order to facilitate the direct charging of expenses to particular tasks within lines of businesses and divisions. We believe that the use of a direct charging system presents a reasonable and auditable method of assigning costs. As such, we see no need for changes to Comsat's policy of direct charging when the work is clearly beneficial to one task. We reach the same conclusion as to Comsat's proposal to assign expenses to a particular line of business or division when that line of business or division is the sole beneficiary of an expenditure. However, to protect ratepayers, we direct the Bureau to continue to monitor this direct charging/assigning system to assure that costs that should be placed in full in

[32] INTELSAT, Agreement Between the U.S. and Other Governments and Operating Agreement, T.I.A.S. 7532, Washington, D.C., August 20, 1971 (entered into force February 12, 1973).

nonjurisdictional accounts do not end up in the shared residual pool and that costs that should be placed in the shared residual pool do not end up directly charged or assigned in full to a jurisdictional account.[33]

50. While we find Comsat's proposed direct charging and assignment system to be generally acceptable, we do have one concern relating to the consequences of charging "intangible" products to jurisdictional accounts. By intangible products we particularly mean Comsat's informational system packages (software). When these items are charged wholly or partially to Comsat's ratepayers, we believe it only equitable for Comsat to grant an ownership interest in these products to its ratepayers. Therefore, if Comsat later makes these intangible products available to entities within Comsat who have not funded the full share of the development of the products, these entities shall compensate the INTELSAT and INMARSAT ratepayers in full by paying to jurisdictional accounts both their share of expenses and a return on ratepayer capital used to develop the product.

51. *Special G&A Expenses:* Comsat has proposed to allocate certain of its shared Headquarters Division expenses by using formulas based on special factors. For instance, Payroll, Human Resources, Compensation and Benefits, Employee Relations, Human Relations and EEO, Safety and Health, Credit Union, and Trust Fund Administration expenses are to be allocated based on "personnel" count of its subsidiaries and the WSD. We believe that the ratio of jurisdictional personnel to total corporate personnel is a reasonable manner by which to allocate the expenses of these Headquarters Staff groups. However, we note that Comsat omits all Headquarters staff groups from the denominator (total personnel count) of its special factor formula. Since this omission would distort the allocation process, we believe it appropriate for Comsat to include in its total personnel count all employees, including Headquarters staff members.

52. Comsat proposes to allocate Common Stock Services and Shareholder Meeting costs on the basis of assets (including among its assets its investment in partnerships, such as SBS). Comsat maintains that the shareholder's investment in the corporation is best reflected on an ongoing basis by the assets of the corporation. We find that the usage of an assets factor for this purpose appears to be reasonable.

[33] To this end we direct Comsat to maintain an up to date and detailed description of all work and associated costs Comsat directly assigns to lines of business rather than to specific corporate tasks and make this available to the Commission. This description will enable the staff to determine whether any given work item should legitimately be charged or assigned, in whole or part, to the jurisdictional ratepayers. We expect, of course, that Comsat will directly assign costs to nonjurisdictional accounts with the same vigor that it assigns costs to jurisdictional accounts.

53. Comsat also proposes to employ the assets factor to allocate certain Treasurer and Treasury Operations expenses. These staff functions deal with corporate financing, including both debt and equity. Comsat claims that the primary function of these staff members is to protect corporate assets and therefore the use of an assets factor is appropriate. We disagree. We find from the record and our own examination that these financial staff groups are concerned with funding for current operations and corporate expansion in addition to protection of assets. Therefore, the amount and utilization of such funding for expansion, current operations and protection of assets would constitute a better special factor than assets alone. Comsat has defined the amount and utilization of such funding as "expenditures."[34] We therefore direct Comsat to use its "expenditures" methodology to allocate Treasurer and Treasury Operations expenses.

54. *Residual G&A Expenses:* All G&A expenses not directly charged, assigned or allocated by special factors are placed in a residual pool. These expenses are then allocated pursuant to a general formula between various jurisdictional and nonjurisdictional accounts. There is no disagreement among the parties in this proceeding that residual pool expenses should be allocated pursuant to a general formula which best reflects the "activity" of the corporation. Comsat currently employs a three factor formula to allocate these costs but has indicated a willingness to use a formula based on relative expenditures. In our correspondence to Comsat we raised the possibility of using a formula based on current operating expenses. In its filings M/A-COM proposes the use of a "cash expense" formula to allocate residual G&A expenses. The question, then, is which of these formulas, if any, reasonably reflects Comsat's activities and operations.

55. Our review of Comsat's activities leads us to conclude that Comsat is now heavily engaged in the development of new business ventures, that all of these new activities are nonjurisdictional, and that most of these new businesses have little or no property, plant or equipment at the present time. As more and more Headquarters Division resources are devoted to nonjurisdictional activities, we believe it only fair that the allocation of the residual G & A expense pool reflect this change in corporate activity. This conclusion is based on our review of Comsat documents which reflect the corporation's direction, activities and use of resources. Almost every corporate document the Bureau examined in its audit contained a greater amount of discussion on, and showed a greater

[34] Expenditures includes funds useful only during the present year (cash expenses) and funds useful for future years (capital additions to plant). Expenditures, for this purpose should also include Comsat's investments in partnerships, such as SBS.

amount of resources allocated to, competitive matters rather than jurisdictional matters.

56. Moreover, we have found that Comsat's Headquarters staff is structured in such a way as to provide unequal support to the nonjurisdictional side of the corporation. WSD performs internally almost all of its operating and staff functions (except for accounting), while most competitive elements within Comsat rely on Headquarters staff for various operating and staff functions. Since Comsat uses the corporate staff to support its affiliates to a much greater extent than it uses them to support the jurisdictional entity, the allocation formula for G & A residual expenses should reflect this reality. For example, COMSAT General, although not a new organization, has no legal staff of its own. Instead, it relies solely on the legal staff within the Headquarters Division, even for day-to-day operations. According to Comsat, the ratepayer does not suffer from this inbalance because Headquarters Division attorneys directly charge their time to COMSAT General. We disagree. Although many of the expenses associated with those Headquarters Division attorneys who do legal work for COMSAT General are charged directly to COMSAT General, other overhead expenses (such as annual and sick leave) are placed in the residual pool and allocated to the ratepayer. Therefore, the fact that a particular attorney is not a member of COMSAT General, but is instead a member of Headquarters staff, has an impact upon the jurisdictional ratepayer through the inclusion of some COMSAT General costs in the residual pool. Although we do not object to Comsat's continued use of Headquarters staff for COMSAT General legal work and other support assistance, we shall not permit the use of a formula that unfairly allocates the corresponding residual expenses to the ratepayer.[35] Our remedy is twofold: to monitor Comsat's assignment into the residual pool of Headquarters staff expenses that directly support nonjurisdictional elements and to prescribe an allocation formula for the residual expense pool which more accurately reflects Comsat's activities. Such a formula would charge a slightly greater percentage of residual pool expenses to nonjurisdictional accounts.

57. We believe that neither the three factor formula nor the expenditures formula accurately reflects Comsat's increased emphasis on activities which do not have mature capital assets. Both the existing three factor formula and the proposed expenditures formula give considerable

[35] Another example is provided by the Corporate Development Staff. This staff works exclusively on developing new projects for the manufacture or sale by nonjurisdictional entities within the corporation. It does not perform project development for WSD, since WSD has its own internal Business Development staff of about 50 people. The only direct relationship to the ratepayer is a small amount of review of the ICS Business Plan performed by one member of the Corporate Development staff. Yet, more than a small amount of expenses from this staff group are placed in the residual pool for allocation.

weight to capital assets (property). The three factor formula contains capital assets as one of its factors. The expenditures formula includes yearly capital asset outlays. Since the jurisdictional INTELSAT operations of Comsat are mature in their use of capital relative to the nonjurisdictional operations of Comsat, use of either formula proposed by Comsat would shift substantial residual expenses into Comsat's INTELSAT revenue requirement. The same bias, although to a lesser degree, exists in the operating expenses formula which we asked Comsat to consider. This formula includes depreciation, the yearly cost of property. These shortcomings do not exist in a formula which focuses only on cash expenses. A cash expense formula would eliminate the capital cost bias and compensate for leaky residual pool assignments. We therefore prescribe the use of a cash expense formula for allocating residual G&A expenses.

58. A formula based upon cash expenses would properly assign common corporate costs to both developed and developing businesses. A cash expense formula would allocate expenses to Comsat's developing ventures, regardless of their current lack of property. Since developing ventures generate cash expenses either internally or through outside contracts, at least some residual expenses would be assigned to developing ventures based on the cash expenses test. The jurisdictional businesses also generate substantial cash expenses in addition to capital costs. Cash expenses are generated by Signatory meetings, preparation of Signatory papers, participation in INTELSAT and carrier planning meetings, and interaction with customers. Therefore, even under the cash expenses formula, a substantial percentage of expenses allocated to the residual pool would still be charged to jurisdictional accounts.

2. R & D

59. *Scope of Jurisdictional R&D Expenses:* The proper assignment and allocation of all expenses has become more important as Comsat has increased its nonjurisdictional activities. This is particularly true for R&D expenses as R&D performed for the jurisdictional element now also benefits the nonjurisdictional element. In 1983 Comsat labs spent approximately $48,500,000 in operating expenses. Of this amount, Comsat charged approximately $12,000,000 (24%) to nonjurisdictional accounts and approximately $37,000,000 (76%) to jurisdictional accounts.[36] Because of the size and allocation of these expenses we would be remiss not to

[36] Of the jurisdictional total, Comsat directly assigned its entire corporate initiated Category I expenses of $14,000,000 to its INTELSAT ratepayer. It assigned its internal WSD (e.g., ICS and ITS) customer initiated Category III expenses of $4,000,000 to both its INTELSAT and INMARSAT ratepayers. Finally, it assigned its external customer initiated (also called contract) Category III expenses of $19,000,000 primarily to its INTELSAT ratepayers.

examine Comsat's practices for charging R&D expenses.[37] Below we examine Comsat's practice of charging ratepayers for R&D expenses done under contract for INTELSAT, INMARSAT, and the U.S. government. We also examine Comsat's expense charging practices for R&D not done under contract.

60. *Contractual R&D Expenses:* In the *First Comsat Structure* order we concluded that R&D expenses associated with INTELSAT and INMARSAT contracts are not properly included in jurisdictional accounts because performance of such contracts is not mandated by the Satellite Act. Since U.S. government and commercial contract expenses have no greater jurisdictional connection than INTELSAT and INMARSAT contract expenses, we conclude here that U.S. government and commercial contract expenses should also be excluded from jurisdictional accounts. Moreover, although the performance of contracts for governments and international organizations generates revenues for jurisdictional accounts, our audit indicates that these revenues may not cover expenses. Since the performance of R&D under contract is required by neither the Satellite Act nor the INTELSAT Agreements, and since ratepayers would have to cover any revenue shortfall, we believe that Comsat should exclude all U.S. government and commercial, as well as INTELSAT and INMARSAT, R&D contracts from jurisdictional R&D accounts.[38]

61. We emphasize that we are not here prohibiting Comsat Labs or segments of the WSD from performing contracts for the aforementioned entities if they so choose. In fact, we recognize that permitting Comsat to bid for R&D contracts is beneficial. We are merely stating that the performance of contract R&D is outside of Comsat's mission under the Satellite Act and the INTELSAT Agreements. Thus, all expenses and revenues associated with contract R&D should be placed in nonjurisdictional accounts rather than commingled with jurisdictional expenses and

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[37] We are also concerned because jurisdictional INTELSAT R&D expenses accounted for about 17 percent of operating revenues - an extraordinarily high percentage, considering that INTELSAT, not Comsat, is responsible for development of the INTELSAT global satellite system.

[38] The expenses and revenues of other contracts should similarly be excluded from jurisdictional accounts. This includes the expenses and revenues of the WSD's INTELSAT Technical Services (ITS) unit for the so called Technical Services Contract with INTELSAT. The staff also found that ITS performs no jurisdictional functions and provides service only to commercial organizations. In addition, ITS supports Comsat affiliates such as SBS. Therefore, all expenses and capital costs associated with ITS are nonjurisdictional. The WSD's Maintenance and Service (M&S) center provides support services to commercial entities as well as for INTELSAT earth stations. M&S support services provided under contract for outside entities or internal nonjurisdictional lines of business are nonjurisdictional. M&S support services provided to internal jurisdictional lines of business such as INTELSAT earth stations are jurisdictional and may be included in Comsat's jurisdictional revenue requirements.

revenues. Comsat claims that it would have to duplicate the contract work if it did not win competitively the right to perform these contracts. This argument is without merit. The results of INTELSAT and INMARSAT contracts are made available to all Signatories, including Comsat, irrespective of the degree of contract participation by the Signatory. Similarly, the results of U.S. government funded R&D contracts are made available to the public (including Comsat) whether or not Comsat acts as a government contractor. Therefore, such duplication would be wasteful and certainly not beneficial to the jurisdictional ratepayer.

62. *Noncontractual R&D Expenses (General):* Comsat also places into its jurisdictional accounts noncontractual R&D which it states is useful to its INTELSAT/INMARSAT ratepayers and consistent with its statutory mission. At the present time Comsat directly assigns WSD initiated (Category III) R&D expenses to jurisdictional accounts, directly assigns subsidiary and partnership initiated (Category III) R&D expenses to nonjurisdictional accounts, and places all other corporate (Categories I and II) R&D expenses in a residual pool. The expenses in the residual pool are assigned pursuant a "primary benefitting entity" test to jurisdictional and nonjurisdictional accounts.[39]

63. The direct assignment of identifiable expenses to a jurisdictional account, a nonjurisdictional account, or a residual pool for subsequent allocation under a formula is consistent with the accounting practices which we have prescribed herein for other expenses. For R&D expenses we expect Comsat to continue to directly assign clearly identifiable expenses in a manner consistent with this order.[40] However, we cannot accept the continued use by Comsat of the "primary benefitting entity" test for allocating the R&D residual pool expenses. We stated in our *First Comsat Structure* order that the "primary benefitting entity" test results in an unreasonably high percentage of R&D being funded by ratepayers. We found that the entire costs of a research project were being funded by ratepayers despite identifiable or reasonably foreseeable benefits to competitive ventures.[41]

64. *Noncontractual R&D Expenses (Residual Pool):* In its filings Comsat has proposed to replace the "primary benefitting entity" test for assigning residual pool expenses with a "matrix" formula. As described in paragraph 16 and footnote 16, the matrix formula assigns residual pool

[39] Under this test, 100 percent of a project's expenses are assigned by Comsat to either a jurisdictional or nonjurisdictional account, depending on whether the primary benefit (51 percent) of the project flows to the jurisdictional or nonjurisdictional element.

[40] Category II R&D expenses - those expenses which are corporate initiated projects for nonjurisdictional entities (subsidiaries and partnerships) - should continue to be directly assigned to nonjurisdictional accounts except for MMIC expenses. See also paragraph 68, *infra.*

[41] *Comsat Structure,* 90 FCC 2d at 1179.

R&D expenses to one of six broad classes of R&D. Then a determination is made as to whether each of these six classes of R&D benefits or will potentially benefit the various lines of businesses, both jurisdictional and nonjurisdictional, of the corporation. (A class of R&D may benefit one or more lines of business and a presumption exists that a class of R&D benefits or will benefit each line of business). Then, the expenses within a particular class are allocated pursuant to an activity formula.[42] For jurisdictional expenses, the numerator of the expenditures formula is the sum of all jurisdictional expenditures, other than R&D. The denominator is the sum of all expenditures, other than R&D, in the lines of businesses which benefit or potentially benefit from the subject R&D class.

65. Comsat's proposed matrix formula assigns particular classes of R&D expenses to some but not all of its lines of businesses. Yet, Comsat assigns all of its classes of R&D to each line of jurisdictional business. Comsat has submitted a "Comsat Laboratories Matrix Analysis" in support of this assignment practice. Except as indicated below, we find that Comsat has not factually supported its proposed approach. As to the issue of excluding certain competitive lines of businesses from supporting certain classes of R&D, we find that all of Comsat's lines of businesses (with the possible exception of Compact Software) have the potential to exploit all of the classes of R&D conducted by the Labs. The classes are broad and the competitive lines of business are not sufficiently narrow for us to conclude that the businesses do not or will not benefit from these classes of R&D. For example, ERT, a subsidiary which sells remote environmental monitoring products and services, has for years been actively considering the interaction of satellite communications with data collection from its remote sensors. If earth station and satellite costs eventually come down, partly due to advances at Comsat Labs, such integration would be marketable. Therefore, the Earth Segment, Space Segment, MMIC and Other Related Technology Development classes of R&D could potentially benefit ERT. Accordingly, these classes of R&D expenses should in the future be assigned to the ERT line of business so that this line of business supports a small fraction of these classes of R&D expenses.[43] Similarly, Comsat General is involved in such a large number of communication services and equipment development activities that it is unreasonable to exclude this line of business from the basic R&D classes of MMIC and Other Physical Sciences. These two classes are the cornerstones of Comsat General's commercial activities. For these rea-

[42] In its subsequent filings Comsat proposed to use an expenditures activity formula rather than a three factor activity formula.

[43] In addition, ERT already benefits from the Other Physical Sciences and Technology class of R&D through such projects as sensor research. Therefore, this class of R&D should also be assigned to ERT.

sons, we find that MMIC and Other Physical Sciences expenses should be included in the matrix formula for Comsat General.

66. Comsat also argues that the Systems and Services class of R&D expenses should be excluded from the STC line of business. We do not agree. Systems and Services work includes general studies such as the trade-offs of size/weight/power in spacecraft design. This class of R&D is just as useful for a direct broadcast satellite as it is for an INTELSAT communications satellite. Comsat also argues that the Software class of R&D expenses, including Computer-Aided Design expenses, should not be charged to two subsidiary lines of businesses, Amplica and Telesystems. Again we cannot agree with this proposal. Amplica and Telesystems manufacture and sell a wide variety of high technology products. Computer-Aided Design software is useful to the design, manufacture and eventual sale of this equipment. Therefore, these two lines of businesses should be assigned Software R&D expenses.

67. The only exclusion that we shall accept as arguably justified and is that relating to Compact Software. This organization has no direct business in satellite systems technology or services, but instead serves only to support the Labs in its hardware and software development. Therefore, the relationship between Compact Software activity and the Earth Segment, Space Segment, and Systems and Services classes of Lab activity seems sufficiently remote to permit an exclusion.

68. In addition to advocating the exclusion of some nonjurisdictional lines of businesses from paying for certain classes of R&D expenses, Comsat requests that it be permitted to include the WSD in the allocation of all corporate classes of R&D expenses (including both Category I jurisdictional projects and Category II nonjurisdictional projects). We shall permit Comsat to include a portion of all Category I R&D in jurisdictional accounts according to the allocation formula described below. However, we do not believe that all Category II projects are of benefit to the jurisdictional ratepayer. Many of these projects do not advance the state-of-the-art of satellite technology so as to benefit ratepayers. They do, instead, enhance Comsat's commercial (nonjurisdictional) lines of businesses by researching the application of already developed technology for commercial purposes. As such, ratepayers receive no benefit from these R&D projects and should not be forced to participate in the funding of such products. Of the Category II tasks descriptions submitted to us, we find that only the MMIC class of R&D projects which relate to basic research have any potential benefit to the ratepayer. Therefore, we direct Comsat to exclude all other Category II projects from allocation to the jurisdictional ratepayer.

69. *Noncontracted R&D Expenses (Formula):* Classes of R&D expenses not excluded from a particular line of business by the matrix

approach must be apportioned between benefitting lines of businesses. Since the benefits of current R&D work do not ordinarily become apparent for at least three or four years, it is impossible to measure precisely the benefits of all current R&D at the time the work is performed.[44] Thus, while a formula to estimate future benefits is required, as a practical matter, we can use only measurements of current activity in this formula. Comsat contends that most of the benefits of its current R&D program flow to its jurisdictional ratepayers and that the use of an "expenditures" activity formula to allocate R&D expenses would best reflect this flow of benefits. However, as explained below, our examination of Comsat's activities leads us to find that the R&D program substantially benefits Comsat's nonjurisdictional activities and that a cash expense formula would more accurately reflect the flow of benefits.

70. Comsat Labs are engaged in basic R&D which can lead to an infinite variety of new commercial products and services. Even as to R&D relating directly to INTELSAT/INMARSAT earth stations or INTELSAT/INMARSAT service, a great deal of the benefit also flows to the competitive businesses. This result occurs because R&D results generally are reflected in improved equipment which is produced and marketed by unregulated subsidiaries of Comsat and sold back to the jurisdictional entities. Examples of equipment developed (at least in part) at ratepayer expense but marketed by commercial affiliates of Comsat include INTELSAT TDMA terminals, ship terminals for INMARSAT access, echo cancelers, and torus antennas. Based on this flow of actual benefits to competitive entities, we must ensure that these entities fund their fair share of corporate R&D expenses.[45]

71. We believe that the only formula suggested in this docket that adequately accounts for the full range of the benefits of basic corporate R&D to emerging competitive entities is "cash expenses." Our selection of the cash expenses formula for allocating residual R&D expenses is consistent with our selection of this formula for allocating residual G&A expenses. The expenditures formula, on the other hand, does not accurately measure yearly activity. This is so because expenditures takes

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[44] This is particularly true for R&D which may benefit Comsat's nonjurisdictional commercial activities. A period of three to four years is generally thought of as the minimum time necessary to commercialize a discovery made in an electronics laboratory such as Comsat's.

[45] We are also concerned because when a basic R&D project has sufficient commercial potential, the results of that R&D project and, on occasion, the people that have participated in it are transferred to competitive subsidiaries. Therefore, the great bulk of the benefit of this corporate R&D may flow to the competitive side of Comsat. The actual transfer generally occurs through a Category II or Category III program funded by the subsidiary. However, the entire work prior to the actual transfer typically has been funded by the ratepayers.

into account the total costs of additions to property and these additions normally last anywhere from seven to thirty years. The yearly cost of these property additions is not computed in the expenditures approach. If additions to property were to have any relevance to yearly activity, the costs of these additions would have to be divided by the lifetime of the property. Although such a normalized formula is conceivable, it is not one normally used and has not been suggested by any of the parties. Therefore, we do not consider expenditures a meaningful measure of current activity for allocating any residual costs.[46]

72. We also note that cash expenses is the only factor that would allocate R&D expenses to a nonjurisdictional line of business such as EARTHSTAR (weather and land satellites), on which Comsat has devoted a very large direct effort internally, but which has never matured into an operational system with property and revenues. While Comsat has directly assigned certain operational and G&A expenses to EARTHSTAR, it has not allocated any R&D expenses to this line of business. The fact that this program was not procured by Comsat is not relevant to the question of whether this or similar ventures could benefit from work done at the Labs. They largely can and do; for without the extensive effort in basic R&D at the Labs, Comsat could not consider entering the vast number of high technology, new businesses programs that are now under its active consideration. Therefore, we reject allocation approaches that do not properly account for all of the benefits of basic corporate R&D to lines of business in various stages of development.

73. *R&D Capital Costs:* We now address the issue of what capital costs associated with R&D, primarily Comsat Labs plant and equipment, is "used and useful" to the jurisdictional ratepayer and hence should be included in Comsat's jurisdictional rate base. We believe that any capital costs that are wholly identifiable with either jurisdictional or nonjurisdictional Lab projects should be placed in the corresponding account. It is those capital costs which support both jurisdictional and nonjurisdictional projects that must be apportioned. Comsat argues that we should apportion these shared costs based on the ratio of jurisdictional R&D "expenditures" to total R&D "expenditures." We disagree for the reasons given previously, i.e., expenditures unfairly allocates capital costs to INTELSAT ratepayers. We instead direct Comsat to employ the ratio of jurisdictional R&D cash expenses to total R&D cash expenses for this

[46] This conclusion can be contrasted with our recommended use of expenditures to allocate certain expenses associated with Headquarters Finance. In that situation, we were not measuring current activity, but arriving at a reasonable cost/benefit relationship associated with the expenditure of funds by a portion of corporation staff. We believe that use of expenditures to allocate Headquarters Finance expenses fully satisfies Comsat's concern that we recognize the importance of capital outlays within the corporation.

formula. We find that this ratio most logically and fairly allocates the benefits flowing from the use of shared R&D capital assets.

74. *G&A Capital Costs:* Comsat uses fixed percentages for the allocation of capital costs associated with G&A activities. The capital costs involved are primarily those of Comsat Headquarters plant (building and contents) and Comsat computers located both at the Headquarters and Laboratory locations. Comsat allocates 68 percent of Headquarters building and 100 percent of all computer capital costs to jurisdictional accounts. Although G&A capital cost assignments were not specifically addressed in our *First Comsat Structure* order, the Bureau's examination revealed accounting practices which do not accurately reflect Comsat's activities and therefore should be modified.

75. We found in the *First Comsat Structure* order that the fixed allocation of R&D capital costs to the jurisdictional ratepayers to be unreasonable. We therefore prescribed in that order the use of an activity formula to allocate R&D capital costs. We find here that the fixed allocation of G&A capital costs to be equally unsatisfactory. Capital costs of G&A facilities should be allocated according to formulas that fairly reflect the use of the facilities.

76. We believe that the formula for allocation of Headquarters capital costs should be based upon the proportion of Headquarters space occupied by the benefitting entity. If a space is occupied by persons performing direct jurisdictional (i.e. Signatory) functions or direct nonjurisdictional (i.e. Comsat General legal and other support) functions, capital costs of plant proportional to space occupied by these employees would be placed directly into the respective jurisdictional or nonjurisdictional accounts. Thus, if an employee spends a specific percentage of time doing jurisdictional tasks, that percentage of his/her office space would be directly charged to a jurisdictional account. If the space is occupied by persons (such as certain corporate staff) performing functions that support the corporation as a whole (both jurisdictional and nonjurisdictional functions), then capital costs of plant proportional to space occupied would be placed into the appropriate shared corporate account. As we have indicated in our discussion concerning the allocation of shared G&A expenses, expenses for each corporate account are allocated by means of general or special formulas depending on the particular account under consideration (e.g. Finance and Personnel) and the nature of the benefit flowing from that shared account. In a like manner, capital costs associated with shared Headquarters staff functions would be apportioned by the same general or special formulas. Similarly, we believe that a formula for the allocation of computer capital costs should be based upon usage (time) of the computers by the various entities within the corporation. Again, when persons clearly engaged in jurisdictional or

nonjurisdictional activities use computer time, proportional capital costs would be placed in the respective accounts. When persons are engaged in corporate wide activities, proportional capital costs would be placed in the corresponding corporate account for final distribution to jurisdictional and nonjurisdictional accounts by means of formulas prescribed for shared G&A expenses. We again direct Comsat to implement this modification and the Bureau staff to monitor the implementation of these formulas.

D. *Miscellaneous Issues*

77. *Allocation to Comsat Partnerships:* As we have noted, Comsat, in addition to having full ownership of a number of subsidiaries, is also a partner in a number of satellite communications companies. Comsat's major partnership interests are a one-third share in SBS and a one-half share in Intelmet. Comsat has argued that, since it does not solely own and control these partnerships, no residual G&A and R&D expenses should be assigned to them. From an accounting perspective, Comsat would treat these as passive investments, somewhat akin to placing funds in a bank account.

78. Based on the examination of our staff, Comsat's position on cost allocation treatment for partnerships does not comport with the reality of its participation. Rather than a passive investor, Comsat is heavily involved in the planning and direction of these partnerships. For instance, Comsat Headquarters staff is represented on various committees composed of the three SBS partners and takes an active role in the activities of SBS. In addition, the 1983 Comsat Laboratories Strategic Business Plan lists support to SBS as part of the statement of purpose for the very existence of the Labs itself. We are not persuaded by Comsat's argument that SBS pays fully for Headquarters and Lab support by the direct charging (or assignment) mechanism. The Bureau's examination found numerous instances of Headquarters support where no direct charge (or assignment) to SBS was made. Therefore, we refuse to recognize typical accounting distinctions for differing treatment of wholly owned subsidiaries from partnerships as being meaningful in this case. Instead, we direct Comsat to treat SBS and other partnerships on the same footing that it treats its subsidiaries for allocating G&A and R&D expenses. Specifically, Comsat should include in the denominator of its various activity formulas one-third of SBS' and one-half of Intelmet's cash expenses.[47]

[47] The only exception to this policy of allocating all residual Headquarters G&A costs to partnerships is where the partnership can clearly show that it is receiving no support from Comsat because it is performing the function itself. Examples might include personnel, payroll, and trust fund administration. We direct the Bureau to consider any exceptions that Comsat may propose.

79. *Proprietary Rights to Patents & Data:* Comsat raised the issue of the assignment of proprietary rights when costs of corporate research and development are shared rather than directly assigned in their entirety to Comsat's jurisdictional and nonjurisdictional activities. Comsat states that its nonjurisdictional affiliates, by funding part of the common R&D costs, should be entitled to share in the resulting benefits. By this, Comsat desires that its affiliates get royalty-free access to any resulting inventions, technology, or data from projects to which they have contributed any portion of the total costs. Comsat also argues that its nonjurisdictional affiliates should legitimately have knowledge of and access to research and development projects which are funded in part by the affiliates before the affiliates' competitors are made aware of these projects.[48]

80. We agree that Comsat's affiliates should get some benefit from projects which they have partially funded. We disagree, however, about Comsat's estimation of the amount of that benefit. We see no reason why the affiliates should pay no royalty whatsoever unless they have funded the entire cost of the project. Barring this, the royalty fees should be apportioned between the jurisdictional and nonjurisdictional entities in proportion to their contributions. For example, if the jurisdictional entity has contributed 50 percent of the cost of a project, it should receive 50 percent of any revenues, royalties or fees for inventions, technology, or data resulting from that project.

81. We reject Comsat's argument that its affiliates should get advance knowledge of any R&D project funded both by the affiliate and by the ratepayer. We stated in our *First Comsat Structure* order that if the jurisdictional entities contribute any part of the costs of a project, then Comsat must grant licenses in all resulting technology and patented inventions to all qualifying third parties – including the competitors of Comsat's affiliates – on fair, reasonable, and nondiscriminatory terms. We believe that such a policy would be severely compromised by allowing Comsat's competitive affiliates preferential access to R&D partially funded by the ratepayer. We reason that if these affiliates have early access, they could gain a marketing advantage over competitors based on ratepayer financed work.

82. We note that nonjurisdictional entities may obtain immediate access and royalty-free treatment of Laboratory technology and inventions by fully funding any R&D project they desire from start to finish without ratepayer support. In such cases, the ratepayer would have no financial or informational interest in the project and the project would be the affiliate's property.

83. *Transfer of Technology and Personnel from the Labs:* M/A-COM argues that Comsat Labs should not be permitted to undertake R&D

[48] First *Comsat Report* at 35-36.

projects for any of Comsat's affiliates even where expenses are fairly allocated between jurisdictional and nonjurisdictional accounts. M/A-COM states that Comsat could circumvent non-discriminatory licensing and information flow requirements by simply transferring employees within the Labs or from Comsat Labs to the product development facility at the competitive affiliates. M/A-COM states that the employees could then promptly "re-invent" the process, technique or result and integrate it into the affiliate product development process, thereby creating a marketplace advantage over competitors.

84. We shall first address the issue of whether Comsat Labs should be prohibited from doing support projects for its competitive affiliates. We think not. Although M/A-COM is correct that a transfer of personnel may result in a transfer of know-how, this transfer does not disadvantage the ratepayer for several reasons. First, the ratepayer gets the benefit of a reverse transfer of know-how when the Labs does a support project for the jurisdictional entity. Second, under the R&D allocation mechanism we have developed here, the nonjurisdictional entities pay a share of the basic corporate research involved in generating this know-how and therefore should be entitled to some benefit.

85. Next, we address the issue of whether Comsat should be prohibited from transferring Labs personnel within the corporation in order to prevent Comsat from circumventing our nondiscriminatory licensing requirements. We agree with M/A-COM that such circumvention is theoretically possible. However, we also believe that there could be many legitimate reasons for Comsat to transfer employees from or to its Labs. Absent documented instances of abuse at this time, we would assume that Comsat will abide by the letter and spirit of our information transfer requirements, and therefore we will not now impose a transfer prohibition. We expect our staff to monitor this area and make recommendations to us if additional action on this issue is warranted.

86. *Reporting Requirements:* In our *First Comsat Structure* order, we asked Comsat to propose modifications to its formal reporting system that would enable us to determine if the corporation was fairly assigning or allocating costs to jurisdictional accounts. Comsat has proposed certain additional schedules to its normal Form M and Form 901 reports. We accept these additional schedules as a preliminary step to achieving a reporting system that adequately addresses our concerns and direct Comsat to make these additional filings. However, we intend in the near future to institute a proceeding devoted exclusively to Comsat's reporting requirements to this Commission, with the expectation of revising and simplifying those filings.

87. *Tariff Filings:* We anticipate that these cost allocation modifications will decrease Comsat's jurisdictional rate base and expenses, thus

resulting in a lower revenue requirement. We believe it therefore appropriate to require Comsat to file new rates which reflect this lower revenue requirement. At the same time, since we are aware that Comsat's recent earnings exceed authorized levels, we will expressly require Comsat's retargeted rates to be in compliance with its authorized rate of return (11.48% - 12.48%).

Ordering Clauses

88. In view of the foregoing, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, 403, 404, and 410 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j), 201-205, 403, 404 and 410 (1976) and Sections 102, 201(c)(5), 201(c)(11), 305, and 401 of the Communications Satellite Act of 1962, as amended, 47 U.S.C. Sections 701, 721(c)(5), 721(c)(11), 735 and 741 (1983), that Comsat make changes to its accounting and cost allocation system as set forth herein.

89. IT IS FURTHER ORDERED, that Comsat implement these accounting and cost allocation changes within 45 days of the release of this order, that Comsat file new tariffs based on the resulting revenue requirement changes and its authorized rate of return (11.48% - 12.48%) by June 15, 1984 and that the new tariffs be filed to become effective on 45 days notice.

90. IT IS FURTHER ORDERED, that this proceeding is subject to further order of the Commission.[49]

91. IT IS FURTHER ORDERED, that the Secretary shall cause a copy of this order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

[49] Although Section 601(2) applies to the Regulatory Flexibility Act of 1980 (RFA) (P.L. 96-354) regarding rules adopted pursuant to Section 553 of the Administrative Procedures Act, the RFA is inapplicable where, as here, the underlying Notice of Proposed Rulemaking was adopted prior to January 1, 1981. 5 U.S.C. Section 601 (1980 Supp.).

In addition, the Act excludes from the application of the statute proceedings such as this that involve "a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting or practices relating to such rates, wages, structures, prices, appliances, services, or allowances." 5 U.S.C. Section 601(2).

Compensation of Expenses to Mitigate Cuban AM Interference
Cuban Interference, Compensation for Mitigation of
Interference, Cuban, Compensation for Mitigation of

Part 1, Subpart M, of the FCC Rules and Regulations adopted prescribing requirements and procedures for obtaining compensation for allowable expenses incurred by AM radio station licensees to mitigate interference from Cuba, pursuant to Section 7 of the Radio Broadcasting to Cuba Act.
—*Cuban Interference*
MM Docket No. 84-1

FCC 84-87

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Compensation for Expenses Incurred in Mitigating the Effects of Cuban Interference to Services Rendered by AM Radio Stations in the United States.	MM Docket No. 84-1

REPORT AND ORDER

Adopted: March 15, 1984; Released: March 23, 1984

BY THE COMMISSION:

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I. Introduction

1. In a *Notice of Proposed Rule Making* adopted in this proceeding on January 4, 1984, 49 FR 1091, the Commission invited comments on proposed regulations mandated by section 7 of the Radio Broadcasting to Cuba Act ("the act")[1] Section 7 provides for a program of interim assistance to U.S. AM radio broadcasters in the form of compensation for allowable expenses incurred in mitigating the effects of interference from Cuban stations, and directs the Federal Communications Commission to issue regulations and establish the procedures for providing such compensation. Having considered this matter in light of the comments and reply comments filed in this proceeding, we now adopt the regulations set forth in Appendix B.

II. Background

2. As we observed in the *Notice* inaugurating this proceeding, efforts so far have failed to resolve the problem of longstanding and shifting patterns of interference to AM radio broadcast stations in the United States by Cuban stations. It started before Cuba gave notice in November, 1980, of its intent to withdraw from the North American Regional Broadcasting Agreement as of November, 1981. It has worsened since Cuba withdrew from the Regional Administrative Radio Conference, Rio

[1] Pub. L. No. 98-111, 97 Stat. 749 (Approved Oct. 4, 1983). Section 7 of this Act is set out in full in Appendix A.

de Janeiro, 1981 and declined to sign the Final Acts of that conference (hereinafter sometimes referred to as "the Rio Final Acts"), which established a Region 2 Plan for mutual protection of the AM services of participating Western Hemisphere countries.

3. The Radio Broadcasting to Cuba Act recognizes that the eventual solution is to be sought by negotiating a settlement of U.S. claims to protection against Cuban interference, and the Act looks to the Secretary of State to pursue such a settlement. Meanwhile, the Act calls for the establishment of a program of interim assistance to the United States broadcasters who are adversely affected by Cuban radio interference and who, before, on, or after the date of its enactment (October 4, 1983) incur expenses in mitigating such interference pursuant to special temporary authorizations (STAs) issued by this Commission.

III. Commenting Parties

4. Comments and Reply Comments were filed by the below-listed parties:

Party	Comment	Reply Comment
American Legion Foundation	X	
Clear Channel Broadcasting Service		X.
Department of State, by the Coordinator for International Communications and Information Policy.	X	
Great Southern Broadcasting Company, Inc.	X	
Joint filing by:		
Florida Association of Broadcasters and South Florida Radio Broadcasters Association ("Florida Association").	X	X.
National Association of Broadcasters (NAB).	X	
National Radio Broadcasters Association (NRBA).	X	
National Telecommunications and Information Agency (NTIA).		
Plough Broadcasting Company	X	
Ronald F. Schatz	X	X.
Sudbrink Broadcasting Company	X	X.
Susquehanna Broadcasting Company	X	
United States: Information Agency (USIA).		X.

In deciding upon the regulations set forth in Appendix B, hereto, we have carefully considered the foregoing comments and reply comments. Their substance is noted to the following discussions of the several questions involved.

IV. Discussion

5. *Definition of Cuban Interference.* In AM broadcasting, both domestically and internationally, the presence or absence of interference is customarily determined by whether, at the point of reception, the field strength of the signals of other co-channel or adjacent-channel stations exceeds a stated ratio with respect to the signals of the protected station. The ratios generally applicable among the several countries of the Western Hemisphere are those set out in the Final Acts of the Regional Administrative Radio Conference on Medium Frequency Broadcasting in Region 2, Rio de Janeiro, 1981. Our proposal to use this standard was generally supported by commenting parties. The comments filed jointly by the Florida Associations referred to departures from the provisions of the North American Regional Broadcasting Agreement (NARBA). However, while NARBA at one time prescribed the ratio applicable as between Cuba and the United States, it no longer governs.

6. We believe that the Final Acts of the 1981 AM Conference at Rio de Janeiro provide the appropriate standard to apply in making findings concerning Cuban interference for the purpose of determining eligibility for compensation under Section 7 of the Radio Broadcasting to Cuba Act. Cuba, as a Member of the International Telecommunication Union, has agreed not to cause "harmful interference" to the radio stations of other Members. The United States is an ITU Member. The term "harmful interference" is defined in the ITU Convention as "interference * * * which seriously degrades, obstructs or repeatedly interrupts a radiocommunication service operating in accordance with the Radio Regulations." The Rio Final Acts, comprising an ITU Regional Agreement that has been signed by most countries of the Western Hemisphere (ITU Region 2), establish the norms generally applicable in Region 2 for determining when radiation exceeds a generally acceptable level and is considered to cause "objectionable interference." Under the ITU Radio Regulations this quantified standard is applied, in lieu of the more loosely defined concept of "harmful interference," in determining whether signatories to a Regional Agreement are providing due protection to the stations of the other signatories. Cuba has not signed or adhered to the Rio Final Acts, but this is not to say that the interference standards established in that document are irrelevant or inapplicable to Cuba. The standards established in the Final Acts provide the appropriate basis for quantifying the level of radiation, from a non-signatory to the Rio Final Acts toward stations in any other country in the Western Hemisphere, that may reasonably be considered as likely to cause "harmful interference" within the meaning of the ITU Radio Regulations that do apply to Cuba. In fact, we would find it difficult to understand the justification for quantifying "harmful interference" from any non-signatory in Region 2 toward any

other Western Hemisphere country otherwise than by applying the standards that most countries in this Hemisphere have agreed to apply in determining when radiations reach an objectionable level. We therefore consider it appropriate to apply the norms of the Rio Final Acts in determining whether radiations from Cuba toward AM stations in the United States constitute interference for the purposes of the Section 7 program of compensation to affected American broadcasters. We so provide in Section 1.1702 of the new regulations.

7. One result is that, in determining whether Cuban stations cause skywave interference to AM stations in the United States, we employ the 50% skywave signal incidence standard of the Rio Final Acts rather than the 10% standard that is applicable as among stations within the United States. This approach was supported by the NTIA and other parties, but was objected to in comments filed by the Florida Associations, who contend that because the Commission employs the 10% skywave signal incidence factor for other domestic purposes, it should similarly treat interfering Cuban skywave signals. We believe, however, that for the purpose of the program of compensation under Section 7 of the Act, which concerns interference from another country, it is more appropriate to apply the pertinent international standard.

8. *Method for Calculating the Level of Cuban Interference.* It is usually possible to base calculations of the level of interference on the locations of the interfering stations and known operating parameters such as power and antenna radiation pattern. It has been evident for some time, however, that numbers of Cuban stations are not operating with announced facilities, but are in fact employing powers and other station characteristics different from those reflected in regularly available data. Discrepancies between reported and actual operating powers have been apparent in the results of the Commission's monitoring of received field strengths of Cuban signals at locations within the United States, especially at its Fort Lauderdale monitoring station. In these circumstances, it will be necessary, in determining the power levels of Cuban AM transmissions for the purposes of the Section 7 compensation program, to establish a method that can appropriately be used for calculating such powers until Cuba comes into conformity with the established international practices concerning the announcement of proposed changes in frequency assignments and the avoidance of harmful interference to stations in other countries.

9. In paragraph 21 of the *Notice of Proposed Rule Making,* we recognized the need for periodic monitoring, at suitable locations, of the field strengths of the signals of Cuban stations on all 107 AM channels. Data so accrued, together with appropriate determinations as to the directions from which those Cuban signals are coming, will make it

possible to estimate the powers and locations of Cuban AM stations. From the powers and locations so estimated and using the methods prescribed in the Rio Final Acts, it will be possible to predict the levels of interference caused by Cuban AM stations. The data so obtained will not only permit determinations of whether interference reaches the minimum levels qualifying licensees for compensation, but will also provide verified, documented, and consistently compiled particulars concerning Cuban operations on all 107 AM channels that will be indispensable to resolution of the Cuban interference problem that Section 7(a) expressly intends that the Secretary of State should seek.

10. The USIA recommended that the presence of Cuban interference be verified by continuous measurements taken on the periphery of the station's primary service area, that the interference be clearly identifiable and audible above other common noises, and that calculations of probable effects of monitored Cuban signals not be considered sufficient. It is pertinent to bear in mind that the limitations that are placed on compensation both by Section 7(b) of the Act and § 1.1708 of the new regulations will make it necessary for recipients of compensation to bear very substantial amounts of the costs involved in making the necessary facilities changes. For this reason, it is unlikely that AM broadcasters will embark on facilities changes unless significant interference is experienced on a scale that impinges harmfully on the service the station is able to render. The regulations contain safeguards against including in the compensation program facilities changes made for purposes other than recovering service lost to Cuban interference, such as to enlarge service areas beyond their previously established interference-free contours. In these circumstances, we have difficulty justifying the additional burdens and costs that would be associated with the kinds of showings of "actual" interference that the USIA proposed be required. The industry's responses to the Commission's invitation that it participate in the procedures necessary to carry out the program, including monitoring, was predominantly negative. One comment suggests that the cost of administration could be reduced if the task of administration program were contracted out. However, no analysis to support this view was provided in the comment.

11. We had proposed that monitoring for the purpose of determining the *existence* and the *level* of Cuban interference be conducted semimonthly. (We discuss later, in paragraphs 18 to 21 the differently structured monitoring methods proposed for the separate purpose of determining the *incidence* or *duration* of such interference.) The NTIA recommended that the monitoring from which the levels of Cuban interference would be determined be conducted much more frequently than semimonthly, in fact, as frequently as daily. That would increase the

cost of such monitoring enormously and would be beyond the foreseeable resources of the Commission. Moreover, we do not believe that routine monitoring as detailed and voluminous as that is necessary for reasonable implementation of the program of compensation established in Section 7 of the Act. Also, we do not believe that it would be necessary to carry out the purposes of other parts of the Act. In particular cases it may become appropriate to monitor more frequently than semimonthly. Within the capacities of available staff and equipment, that could be done on an *ad hoc* basis. The NTIA also expressed in concurrence with the technical procedures the Commission proposed for determining the locations and powers of Cuban AM stations, but cautioned that it may be desirable to correct the measured field strength data for the non-sea portions of the paths, and to take care that measured signals are not contaminated by other signals arising outside Cuba, or by skywaves. We agree. The procedures for monitoring were planned accordingly.

12. *Minimum Level of Interference Qualifying Licensees for Compensation.* As we observed in the *Notice*, the legislative history of the Act indicates that Congress intended that the FCC establish a threshold level of interference in order to qualify an applicant for compensation under Section 7. We proposed that such threshold level be established as follows. The applicant, presuming that the interfering Cuban station operates at the power and at the location derived by baseline studies of the monitoring data obtained as described in paragraph 10 above, and employing the methods of calculation prescribed in the Rio Final Acts, would determine what portion of its otherwise interference-free primary or secondary service area is subjected to Cuban interference. We proposed that the applicant would meet the required threshold level of interference only if the population in the area so subjected to Cuban interference totaled at least 10% of the population within the area in which the station would render interference-free primary or secondary service were it not for the Cuban interference. Most of the parties addressed this proposal.

13. The comments generally supported a requirement that the interference have some defined minimum level of impact. However, almost all of them advocated that holders of previously issued STAs to mitigate Cuban interference should be exempted from the requirement. Affected stations that expended substantial amounts of money for facilities changes to mitigate the effects of Cuban interference may be presumed to have been more than negligibly affected. This is supported by showings of interference submitted by applicants for STAs issued before the compensation program was contemplated. Thus in their case, separate, detailed, after-the-fact showings would not be needed. Their preparation and review would impose a needless burden. We agree, and have provided for such exemption in § 1.1706(b) of the new regulations.

14. The *Notice* Proposed a required showing of interference to 10% of the total *population* within the station's service area. The parties preponderantly advocated that, instead, applicants be permitted to do so in terms of interference to at least 10% of their otherwise interference-free service *areas.* It was pointed out, in response to our reference in the *Notice* to the example of the Florida Everglades as an area of limited population, that there are some local residents and some travelers needing radio service in that sparsely settled area. It was contended that the compensation program should embrace restoration of service to less densely settled areas as well as to the more densely populated places. We disagree. Station licensees are free to seek authorization for facilities changes that will restore service in any areas lost to Cuban interference without in turn interfering with other stations entitled to interference protection. However, Section 7 was not intended to provide full compensation for all costs incurred to mitigate Cuban interference. The language of the statute and its legislative history indicate, rather, that it was intended to provide some assistance in cases where threshold requirements established by this Commission are met. Taking all pertinent circumstances into account, including the need to moderate the costs of the program, and the desirability of applying available funds so that they will benefit the largest numbers of persons subjected to interference, we have found it preferable to retain the population basis for determining whether applicants who are not exempted meet the 10% service impact requirement.

15. The USIA, Susquehanna Broadcasting Co., and Ronald F. Schatz advocated that only interference to the primary service areas of affected stations be taken into account for purposes of compensation under Section 7. The Clear Channel Broadcasting Service, on the other hand, urge that it would be inappropriate not to include interference to secondary service areas. Specifically, CCBS states that, although it may not be possible to restore service to all affected parts of a Class I station's secondary service area, there are considerable numbers of persons dependent upon skywave signals for nighttime aural broadcast service, and excluding consideration of interference to secondary service areas would not be appropriate. We agree, and have drafted the regulations accordingly.

16. The USIA proposed raising the threshold still higher than the 10% level we had proposed. USIA proposed requirements that the measured harmful interference be shown to have increased by 50% or more since October 4, 1982 (one year before approval of the Act), that such interference have caused a reduction of 20% or more in the actual listening audience, and that it have caused a reduction of 10% or more in the station's revenues. The last mentioned requirement raises questions that we would be at a loss to answer. Many factors affect fluctuations in

station revenues (for example, changes in economic conditions, programming changes, the competitive draw of programming offered by other stations, changes in management personnel or techniques). Even if it were possible to isolate the factor of Cuban interference, we believe that carrying out the necessary intensive economic and financial analyses of all the pertinent factors would be too time-consuming and burdensome, and require an unjustified addition of staff qualified to perform such analyses.

17. Measuring reduction in the listening audience as suggested by the USIA would require repeated, expensive, special surveys, and it is unclear how audience losses could be reliably attributed to the single factor of Cuban interference, when so many factors are known to bear on fluctuations in audience levels. Additionally, we do not find that the suggested requirement of a 50% increase in the level of interference would be justified. If Cuban stations are shown to cause interference in that part of a station's service area where at least 10% of the total population in the otherwise interference-free service area reside, it is realistic to consider that both the service and economic well-being of the station are significantly affected. We believe it is consistent with the intent of Congress that, in such circumstances, a station licensee who incurs expenses for mitigating such interference should be considered as eligible for the limited amount of compensation for which the regulations provide. Taking all the foregoing considerations into account, we believe it desirable, in the interests of economical administration of the program, to adhere to the proposal in the *Notice* that the threshold requirements as to the *level* of received interference be established at 10% of the served population, and that the attainment of that level be calculated in the manner previously discussed in this *Report and Order* and provided for in §§ 1.1702, 1.1703 and 1.1704(a) of the new regulations.

18. ***Minimum Duration of Interference Qualifying Licensees for Compensation.*** The legislative history of the Act indicates Congressional intent that the FCC consider threshold requirements not only as to the *level* of interference experienced from Cuban stations, but also as to its *duration.* (See section-by-section analysis of the Act placed in the Congressional Record by Representative Fascell, of Florida, Congressional Record for September 23, 1983, at page H 7680.) The *Notice* proposed that duration of the Cuban interference be shown by logged monitorings of Cuban signals by the station licensees within the affected portion of their service areas or, in some cases, near the station's transmitter. The NTIA urged that such monitorings be performed by the FCC, rather than by the stations. While this would be one way to assure consistent performance of the monitoring in accordance with accepted engineering practice, the task is beyond the resources that are available, or could be

expected to be made available, to the Commission. Monitoring to show *duration* of the Cuban interference (as compared with its level) will be required on sixty consecutive days, in some cases both during daytime and nighttime hours. The Commission lacks the staff and equipment that would be necessary to monitor Cuban signals that many times, and at diverse station locations. The FCC staff will be prepared, however, if and when circumstances call for spot checks or reviews of monitoring conducted by station licensees, to perform such checks. In any event, the FCC staff will closely control the monitoring referred to in paragraph 10, above, that will be performed to establish the *levels* of radiation reaching the United States from Cuban stations on all 107 AM radio broadcast channels. This, it is believed, will provide an adequate and appropriate factual basis for future discussions envisaged for the purpose of resolving the problem of Cuban interference. Bearing in mind the limited purpose of monitoring by station licensees, the requirement that it be performed in accordance with good engineering practice, the review that the Commission will perform in order reasonably to assure that proper standards are observed, and the impossibility of the FCC taking on this additional monitoring task, we believe it desirable to adopt essentially the requirements proposed in the *Notice* with respect to monitoring to be performed by station licensees.

19. The Florida Associations urged that the burden on station licensees of performing the prescribed monitoring over a period of sixty days should be relieved by requiring that it be performed for only thirty days. It must be borne in mind that the purpose of the monitoring by licensees is to determine whether the interference is only sporadic or temporary, or is of sufficient duration to warrant compensation for part of the costs of facilities changes to mitigate its effects. Even sixty days is short for this purpose, but we proposed that period in order to economize on the time and expense of performing this task. We believe that any shorter period would be inappropriate, taking into account the additional fact that, insofar as nighttime skywave interference is concerned, the variability of skywave transmissions necessitates at least a sixty-day monitoring period.

20. The Florida Associations proposed that stations previously authorized to make facilities changes to mitigate Cuban interference be exempted from the requirement of monitoring to show *duration* of interference. The same considerations that we found to justify such stations from showings of the *level* of Cuban interference make it appropriate to apply the exemption also to showings of its duration. Section 1.1706(b) of the new regulations accordingly provides for it. We believe this to be appropriate even in cases where interference on which earlier STAs were based might be shown to have abated. The Act

contemplates that the interference should be resolved, that the facilities changes authorized to mitigate it are temporary in nature, and that holders of STAs issued before the enactment of Section 7 may be called upon to return to their previous facilities without further compensation at such time as the interference is definitively removed. Thus, there is a need for a showing of duration of the interference in new cases, so that compensation will not be provided in cases of random or insubstantial interference. However, we find that no useful purpose will be served by requiring showings by stations that have already experienced interference of sufficient duration to justify their outlay of substantial sums for temporarily changed facilities, under previously issued STAs, before compensation by the Federal Government was contemplated.

21. Several parties recommended that the regulations make clear that monitoring efforts for the purpose of showing duration of interference be set up separately for interference experienced during the daytime and during nighttime hours. That is appropriate and consistent with the intent of the *Notice*, and § 1.1705 so provides. The requirement is that the interference be detected on at least thirty of the sixty days of prescribed monitoring by the station licensee, at least once during the prescribed daytime or nighttime hours, or both, as the case may be.

22. *Compensable Costs: General Considerations.* The intent that the costs incurred in mitigating the effects of Cuban interference be compensated partially, rather than fully, is clearly evident not only in Section 7 of the Act, but also in its legislative history. The section-by-section analysis of the Act that Representative Dante Fascell placed on the record during remarks in the course of the floor debate on September 23, 1983 states, at page H 7680 of the Congressional Record: "The Commission may also consider establishing limits on the type and extent of reimbursable expenses." The USIA points out that the $5 million authorized for the Section 7 program may be expected to cover certain administrative costs as well as compensation payments. If further notes that no funds have yet been appropriated for these purposes, and counsels the need to moderate the size of compensation payments. In prescribing the kinds of costs that will be compensable, and the extent to which they may be compensated under this program, we have applied the limitations expressly laid down in the statute. Moreover, in exercising the discretion conferred on the Commission, we have endeavored to give due weight to considerations urged upon us by the parties. The paramount consideration, we believe, is provided by the current Federal budgetary deficit and the need it imposes to avoid undue demands on the Federal Treasury, while at the same time giving due effect to the Congressional purpose of providing some assistance to affected broadcasters. The American Legal Foundation recommended, in substance, that the Commission make a

study of probable demand before establishing the requirements for compensation; but the statutory deadline for issuing the implementing regulations precludes that approach. With the objective of achieving an appropriate balance among all the pertinent considerations, we have arrived at the following decisions as to the kinds and amounts of expenses that the new regulations should treat as compensable.

23. *Compensable Costs: Replaced Equipment.* In the *Notice of Proposed Rule Making* we considered the express provision of Section 7(b) that expenses eligible for compensation "shall be limited to the cost of equipment (replaced, less depreciation) and associated technical and engineering cost." We initially construed the quoted language as requiring that the amount of depreciation taken for income tax purposes on existing equipment that is replaced by new facilities must be subtracted from otherwise compensable equipment costs. We accordingly proposed to treat as compensable that part of the cost of new equipment remaining after subtracting the depreciation taken on replaced equipment. The USIA commented that, in its view, the legislation bars compensation for capital outlays for new equipment. It recommends that compensation for equipment be limited to the cost of "equipment replaced less depreciation."

24. We accept USIA's interpretation as conforming more closely to the literal language of the statute than the one we initially proposed in the *Notice.* It is pertinent to note that more direct, less debatable language could have been used to make the costs of new equipment expressly compensable, rather than the language in the Act, whose only express reference to includible equipment is to "replaced" equipment, i.e., existing equipment that is replaced by the new facilities. The legislative history is not helpful on this point.

25. Apart from the question of whether the Act bars inclusion of the costs of new equipment, is the probability that, at least in most cases, the basis proposed by the USIA will result in lower compensation than if the cost of new equipment were included. Upon further consideration, we have so drawn Section 1.1708 of the new regulations. We have, at the same time, balanced the resultant reduction in compensation by allowing compensation for the full amount of includible costs (within a $250,000 ceiling), rather than allowing only 50% of such costs, as we originally proposed. Although this may not be expected to offset fully the probable resultant net diminution of compensation, we believe that the course we have adopted properly carries out the mandate of the Act, and reasonably balances the objectives of providing some meaningful assistance to affected broadcasters, while duly moderating resultant demands on the Federal Treasury. Additionally, it will be simpler and more economical to administer.

26. *Compensable Costs: "Associated Technical and Engineering Costs."* The new regulations do not provide for compensation for outlays to acquire and install or construct new equipment, but they do permit compensation for "associated technical and engineering costs" that are provided for in the Act. These costs include out-of-pocket expenditures prudently made to carry out the planning, designing, engineering and testing of new facilities that are reasonably needed to mitigate the effects of Cuban interference, and to carry out monitoring that the regulations call upon station licensees to conduct. Licensees who received FCC authorizations to make such facilities changes before the new regulations prescribing monitoring requirements were adopted may seek compensation, provided they can demonstrate that the costs which they seek to have reimbursed were reasonable and prudently incurred previously in monitoring Cuban signals in order to obtain factual data that they presented to the FCC in support of their requests for such FCC authorizations. We believe that these are reasonable and appropriate conditions to impose on compensation for monitoring. To this extent we do not concur with the recommendation of Sudbrink Broadcasting Company that the costs of taking field strength measurements be compensated, with no qualifying conditions. Sudbrink also recommended that we include the costs of studying alternatives to the facilities changes made to mitigate Cuban interference. We do not consider this appropriate for generalized approval by regulation. Instead, we believe that it would be preferable to consider, on the facts of individual cases, whether the expenses so incurred should be accepted as reasonable and prudent, and otherwise suitable for compensation.

27. *Non-Compensable Costs: Land.* It may be impossible in some cases to construct necessary directional antenna systems on land already owned or used by an affected station for its transmitter and antenna tower(s). This would necessitate the acquisition, or possibly the leasing, of additional land to accommodate new transmission facilities. In the *Notice*, we proposed to exclude land costs as non-compensable. For one thing, it appeared doubtful that land came within the allowable categories of expenses to which compensation was limited by Section 7(b) of the Act. Susquehanna Broadcasting Company supported the proposed exclusion of land costs from compensation. Ronald F. Schuatz recommended in his Reply Comments that land costs be treated as compensable. The NTIA suggested that the ground on which antenna towers are erected, and which contains the essential ground system, should be considered part of the antenna and thus eligible for compensation. The NTIA also suggested that the cost of purchasing land should be allowed, at least in cases where it could not have been obtained by lease. We believe, however, that it would be unduly costly, burdensome, and beyond the Commission's

resources to attempt to determine whether it would have been possible, upon adequate search of the entire area where the antenna might be located, to find land that the owners would be willing to lease. Collateral questions would be likely to arise, such as whether the costs of available leases were reasonable, or so excessive as to warrant purchase. The reasonableness of the price paid for land, and its residual value if its use were discontinued upon cessation of the interference, are questions illustrative of numerous others that we believe would arise and unduly complicate the administration of a provision permitting compensation for the cost of land. The Florida Associations proposed that the cost of leasing land, but not its purchase, be compensable. For reasons similar to those already stated, we consider this undesirable, apart from the fact that it is doubtful that the Act intended to make any land costs compensable, whether incurred for lease or purchase.

28. *Non-Compensable Costs: Legal Fees.* Plough Broadcasting Company disagreed with our proposal to treat legal fees as non-compensable, arguing that the Act may reasonably be construed as intending to provide compensation for legal fees when they are incurred in connection with the facilities changes necessitated by Cuban interference. We disagree. Legal fees do not come within the ordinarily understood meaning of the statutory terms used to describe the costs to which compensation is expressly limited: i.e. certain "equipment" costs, and the costs of "associated technical and engineering expenses." Accordingly we have adhered to our proposal not to treat legal fees as compensable.

29. *Successive Facilities Changes.* Ambassador Diana Lady Dougan, Coordinator of International Communications and Information Policy, Department of State, commented that it would be desirable that the regulations make clear whether a station licensee that had already been awarded compensation for expenses incurred in mitigating Cuban interference would be eligible for additional compensation if additional facilities changes were found later to be necessary to overcome the effects of further changes in the operating parameters of Cuban stations. The USIA recommended that such additional compensation be expressly barred, and that applicants be limited to compensation for only one such change of station facilities. We note in this regard that, after an initial modification, there would usually be relatively limited opportunity to make further changes that would not cause prohibited interference to other stations. There is, moreover, a limit on the capacity and the desire of Cuba to continue indefinitely to make changes in the pattern of its broadcast transmissions, considering the effects of changes in station frequencies and powers on services provided to Cuban listeners. We believe that it would be more equitable, and in keeping with the intent of the statute, that we deal individually with any applications that may be

filed for compensation arising out of changes made after previous modifications for which compensation had been allowed. We would not expect that such additional compensation could be justified except in unusual and highly meritorious circumstances.

30. *Eligibility Confined to Stations Directly Affected.* It would, in our opinion, carry the compensation program beyond the intent of Congress to compensate expenses incurred, not for changes to affected stations, but for changes to other stations that would be necessitated by the remedial action taken by directly affected stations. This could lead to indefinite "daisy-chaining" effects that could multiply the costs far beyond those contemplated by Congress. It would, moreover, be contrary to Commission policy to grant authorizations for facilities changes that would cause prohibited interference to other stations.

31. *Ceiling on Compensation.* The Notice proposed to limit compensation of 50% of the amounts expended for compensable kinds of costs, up to a maximum of $250,000 in each case. Commenting broadcasters and associations opposed both these limitations. The USIA felt that compensable expenses should be limited to the lesser of the $250,000 ceiling or 20% of the fair market value of the station at the time the claim was made. We feel that the views of the USIA, as the agency charged by the Act with responsibility for making compensation payments under Section 7, are entitled to great weight. We believe, however, that it would be undesirable for this Commission to attempt to assay the market value of stations. Our decision to adopt the USIA's more restrictive proposals concerning allowance for equipment costs goes a long way toward achieving the underlying objective of moderating the costs of the program to the Federal Treasury. It appears probable that, if we were to curtail further the already substantially reduced basis for determining the amount of compensation payments, the amount of compensation would be reduced below levels intended by Congress.

32. *Priorities.* In the *Notice* we proposed to classify applications for compensation into three priority groups, and to sequence the applications within each of those groups. Insofar as the comments addressed the proposal, they generally concurred with it. Section 1.1710 of the new regulations contains essentially the proposed provisions. It should be understood, however, that the classification of an application within one of the three priority groups, and its sequencing within that group, does not establish a definitive entitlement to the payment of the amount of compensation in the full amount for which the FCC has found the applicant to be eligible. Nor, for the following reasons, would such finding by the Commission necessarily entitle applicants to receive compensation in the established priority sequence.

33. As provided in § 1.1710(e) and 1.1711 of the new regulations, the FCC will inform the USIA of its findings as to the applicant's eligibility for compensation, and as to its priority classification. That finding is provided for the information of the USIA, upon whom the Act confers the responsibility and the authority to make the compensation payments. Under the Act all appropriations of funds for the compensation payments are made to the USIA as the paying agency. The FCC will make determinations as to whether applicants meet the requirements of the Act and of the regulations for eligibility for compensation, and will determine the maximum amounts for which they qualify. But the Commission will not make the compensation payments or manage the funds that the Act provides will be appropriated to the USIA for this purpose. Since it cannot be known in advance whether funds will be appropriate in sufficient amounts to cover fully the aggregate amounts of compensation for which applicants are found eligible by the FCC, the question of whether the amount for which applicants are found eligible can or should be reimbursed fully, and in a single payment, are questions that must be determined by the USIA.[2]

34. It could happen that, if and when funds are appropriated, they might be insufficient to cover all of the amounts for which applicants will have been found eligible in the sense that they have been found to have satisfied the requirements of the Act and the implementating regulations. It is also possible that developments may expand the foreseeable demand for compensation beyond originally indicated levels, and beyond the amounts of funds that have been appropriated, or for which appropriations may be expected to be provided. In such cases, it may become necessary for the USIA to apportion available funds in some manner, thus making temporary or permanent payments of only some portion of the amounts of compensation for which the FCC has determined applicants to be eligible.

35. An additional reason why the priorities established by the FCC cannot constitute a definitive entitlement arises from the fact that the priority group in which an application falls, and the sequence within the group, will be made initially when the FCC makes the provisional finding of eligibility under § 1.1711(a). Such provisional finding is issued before the new facilities are acquired and installed or constructed. Circumstances may intervene that would delay the construction and the consequent issuance of the definitive eligibility finding under § 1.1711(b). It would not be proper that earlier applicants who delay carrying out facilities changes be able to block the payment of compensation to later applicants who are

[2] Although $5 million has been authorized to fund this compensation program, no funds have yet been appropriated for it. Without such appropriation, compensation payments cannot commence.

found to be eligible, promptly install the new facilities, make all required showings, provide all required documentation and meet all other requirements for compensation in timely fashion.

36. Taking all the foregoing considerations into account, including uncertainty as to whether appropriated funds will be available to cover the entire amounts of compensation for which applicants will have satisfied eligibility requirements, the Commission has concluded that it is appropriate to handle priorities as provided in § 1.1710(e) of the new regulations. Specifically, the Commission will initially designate each application as falling within the First, Second or Third Priority group, and will indicate its sequence within that group. Such determinations will be notified to the applicant and the USIA. This will provide the USIA with the particular information it would need if, in the performance of its function as the paying agency, the USIA found it possible and desirable to exercise its discretion so as to apply the priority ranking and sequence established by the FCC.

V. Order

37. Accordingly, pursuant to authority found in Section 7 of the Radio Broadcasting to Cuba Act, Section 553 of the Administrative Procedure Act, as amended, and Section 4(j) of the Communications Act of 1934, as amended, it is ordered, that, effective August 1, 1984, the regulations appended hereto and designated as Subpart M of Part 1 of the Rules and Regulations of the Federal Communications Commission are adopted.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A—Text of Section 7 of the Act

Section 7 of the Radio Broadcasting to Cuba Act, Pub. L. 98-111, 97 Stat. 749, (1983) provides as follows:

Sec. 7. (a) It is the intent of the Congress that the Secretary of State should seek prompt and full settlement of United States claims against the Government of Cuba arising from Cuban interference with broadcasting in the United States. Pending the settlement of these claims, it is appropriate to provide some interim assistance to the United States broadcasters who are adversely affected by Cuban radio interference and who seek to assert their right to measures to counteract the effects of such interference.

(b) Accordingly, the agency may make payments to the United States radio broadcasting station licensees upon their application for expenses which they have incurred before, on, or after the date of this Act in mitigating, pursuant to special temporary authority from the Federal Communications Commission, the effects of activities by the Government of Cuba which directly interfere with the transmission or reception of broadcasts by these licensees. Such expenses shall be limited to the costs of equipment (replaced less depreciation) and associated technical and engineering costs.

(c) The Federal Communications Commission shall issue such regulations and establish such procedures for carrying out this section as the Federal Communications Commission finds appropriate. Such regulations shall be issued no later than one hundred and eighty days after enactment of this Act.

(d) There are authorized to be appropriated to the Agency (United States Information Agency), $5,000,000 for use in compensating United States radio broadcasting licensees pursuant to this section. Amounts appropriated under this section are authorized to be available until expended.

(e) Funds appropriated for implementation of this section shall be available for a period of no more than four years following the initial broadcast occurring as a result of programs described in this Act.

(f) It is the sense of the Congress that the President should establish a task force to analyze the level of interference from the operation of Cuban stations experienced by broadcasters in the United States and to seek a practical political and technical solution to this problem.

(g) This section shall enter into effect on October 1, 1984.

Appendix B

PART 0—[AMENDED]

Section 0.61 of Part 0 of the Rules and Regulations of the Federal Communications Commission is amended by adding new paragraph (i), reading as follows:

§ 0.61. [Amended]

* * * * *

(i) Process applications for compensation submitted pursuant to Subpart M, Part 1 of this chapter.

PART 1—[AMENDED]

Part 1 is amended by adding a new Subpart M to read as follows:

* * * * *

Subpart M—Implementation of Section 7 of the Radio Broadcasting to Cuba Act: Compensation of Costs of Mitigating Cuban Interference

Sec.

1.1701 Purpose.
1.1702 Definition of Cuban interference.
1.1703 Method for calculating the level of Cuban interference.
1.1704 Minimum level and duration of interference qualifying licensees for compensation.
1.1705 Method for determining duration of Cuban interference.
1.1706 Waivers and exceptions.
1.1707 Required FCC authorization for modification of station facilities.
1.1708 Compensable costs.
1.1709 Requirements for filing applications for compensation.
1.1710 Priorities.

1.1711 Provisional and definitive findings of eligibility.
1.1712 Review of findings.

Subpart M—Implementation of Section 7 of the Radio Broadcasting to Cuba Act: Compensation of Costs of Mitigating Cuban Interference

§ 1.1701. Purpose.

(a) The regulations in this Subpart implement Section 7 of the Radio Broadcasting to Cuba Act, Pub. L. 98-111, 97 Stat. 749 (1983). That statute is referred to in this Subpart as "the Act."

(b) Section 7 of the Act provides for the payment of compensation by the United States Information Agency (USIA) to radio broadcast station licensees for allowable expenses they incur in mitigating interference from Cuba to the broadcast service they provide. Subsection 7(c) directs the Federal Communications Commission to issue appropriate regulations and establish procedures for carrying out Section 7.

(c) The regulations in this Subpart M establish the standards, requirements, and procedures that the Federal Communications Commission will apply in making findings as to whether applicants for compensation under Section 7 of the Radio Broadcasting to Cuba Act qualify for it, and if they do, in what amounts. The Commission will transmit those findings to the USIA for guidance in the discharge of the responsibility that the Act places upon the USIA to make such compensation payments.

§ 1.1702. Definition of Cuban interference.

For the purposes of this Subpart M, Cuban interference to a United States AM broadcast station is radiation from a radio transmitter in Cuba at a level that, under the provisions of the Final Acts of the Regional Administrative Radio Conference, Rio de Janeiro 1981 ("the Rio AM Agreement") would be treated as causing objectionable interference if it occurred between signatory countries.

§ 1.1703. Method for calculating the level of Cuban interference.

(a) The FCC will prepare, periodically update, and make publicly available a list of Cuban stations known to be operating on the 107 channels allocated for AM broadcasting. The list will show the location and calculated operating power of each Cuban station.

(b) In order to obtain the data needed to calculate the power of Cuban stations, the Commission will arrange for the monitoring of the groundwave signals of Cuban AM stations at suitable locations. The field strengths of the signals of Cuban stations operating on all 107 AM channels and the directions from which they are transmitted will be logged as nearly semi-monthly as practicable. The data so obtained will be used in making studies on the basis of which the location and transmitter power of each Cuban station will be calculated.

(c) In order to determine the existence and level of interference to United States AM radio broadcast stations for the purposes of this subpart, Cuban stations will be presumed to be operating at the locations and with the powers determined in the manner stated in paragraphs (a) and (b) of this section; and the methods for calculating interference prescribed in the "Rio AM Agreement" referred to in § 1.1702 will be used.

§ 1.1704. Minimum level and duration of interference qualifying licensees for compensation.

In order to be eligible for compensation under Section 7 of the Act, the licensee of a United States AM radio broadcast station that does not come within the exception under § 1.1706(b) of this subpart must:

(a) Using the methods provided in § 1.1703(c), and treating the station's primary and secondary service areas separately, show that a Cuban station causes objectionable interference to the affected station's signals in a portion of its primary and secondary service area where at least 10% of the total population within that otherwise interference-free primary or secondary service area reside;

(b) Using the methods provided in § 1.1705, show that the signals of a Cuban station have been detected within the service area of the affected station on at least half of the days during a prescribed test period. The reception of such Cuban signals must be separately shown to occur during that part or those parts of the day (i.e., during daytime hours, nighttime hours, or both) when the interference pertinent to an application for compensation occurs.

§ 1.1705. Method for determining duration of Cuban interference.

(a) Section 1.1703 prescribes how the *existence* and *level* of Cuban interference will be determined. This § 1.1705 prescribes how the *duration* or *incidence* of Cuban interference will be determined in order to show compliance with the minimum interference "duration" requirements of § 1.1704(b).

(b) Unless the exception in § 1.1706(b) applies, applicants for compensation shall monitor and log the signals of interfering Cuban stations in the manner prescribed in paragraphs (c) through (e) of this section, and shall submit the results of such monitoring to the Commission.

(c) Using equipment and methods conforming with good engineering practice, licensees whose applications for compensation are based on Cuban interference experienced during daytime hours shall, on 60 consecutive days, take and log field strength measurements of the signal of the interfering Cuban station between two hours after local sunrise and two hours before local sunset during brief intervals when the transmitter of the affected station is turned off. Except as provided in paragraph (e)(1) of this section, measurements shall be taken within the portion of the station's otherwise interference-free service area where the calculations performed in accordance with § 1.1703(c) predict that Cuban interference will occur.

(d) Applicants who experience interference by Cuban *groundwave* signals to their primary service areas at night shall similarly take and log field strength measurements as provided in paragraph (c) above, but during nighttime hours instead of during the daytime.

(e)(1) Applicants who experience nighttime interference by Cuban *skywave* signals to the primary service areas of their Class II, Class III, or Class IV stations shall similarly take and log field strength measurements of the Cuban signals on 60 consecutive days during the nighttime hours between two hours after local sunset and two hours before local sunrise. Such measurements shall be taken in the general vicinity of the affected station's transmitter, but not so close as to experience the effects of re-radiation from the station's own tower(s).

(2) Applicants who experience nighttime interference by Cuban *skywave* signals to their Class I stations shall take measurements as prescribed in the first sentence of paragraph (e)(1), above, at locations within the affected portion of their primary service areas,

unless only their secondary service is affected. In the latter case, the measurements shall be taken within the affected portion of their secondary service area.

(f) The monitoring of Cuban signals prescribed in this section is designed to provide evidence of the *duration* or *incidence* of interfering Cuban signals for the purposes of determining compliance with the 50% requirement in § 1.1704(b). Although the procedures under this section call for the measuring and recording the field strengths of Cuban signals within the affected station's service area, the Commission, when determining whether the minimum *level* of interference prescribed in § 1.1704(a) exists, will ordinarily base its findings solely on calculations performed in conformity with § 1.1703, without taking into account the field strengths recorded by station licensees under this section. However, in cases where the data obtained by monitoring performed by the licensee under this § 1.1705 reflect a consistently large, unexplained disparity from the level of interference calculated under § 1.1703, the Commission may either request the applicant to take further measurements or defer reaching a finding on the application until it reviews and reconsiders the data previously assembled and the calculations previously made under § 1.1703. The Commission will take such further action in each such case as it may find appropriate in the circumstances of the case.

§ 1.1706. Waivers and exceptions.

(a) The Commission recognizes that compliance with some of the requirements for compensation may be needlessly burdensome for licensees whose facilities were modified, for the purpose of mitigating the effects of Cuban interference, under Commission authorization issued before the regulations in this Subpart L were adopted. Accordingly, the Commission will, upon the request of applicants in such cases, consider waiving or adjusting the showings generally required to be made by applicants.

(b) Licensees who were authorized before April, 1984 to modify their station facilities for the explicit purpose of mitigating the effects of interference from Cuba are generally excepted from the requirements of §§ 1.1703, 1.1704, and 1.1705 relating to showings of minimum levels and duration of Cuba interference; provided that, such licensees shall submit such information relating to interference received by them as the Commission may find it appropriate to request in individual cases.

§ 1.1707. Required FCC authorization for modification of station facilities.

(a) Section 7(b) of the Radio Broadcasting to Cuba Act provides for compensation for expenses incurred "pursuant to special temporary authority from the Federal Communications Commission" in mitigating the effects of Cuban interference. This requirement will ordinarily be satisfied by the issuance by the Commission of an "STA" (special temporary authorization) for the purposes of enabling the station to restore service to areas prevented by Cuban interference from receiving interference-free primary or secondary service that the station could otherwise provide.

(b) As Congress was aware, most of the authorizations issued before the enactment of the Radio Broadcasting to Cuba Act, for the purpose of mitigating the effects of Cuban interference, were in the form of STAs. Other forms of licensing have been used in a few cases for the same explicit purpose. The substance of the statutory prerequisite to compensation referred to in paragraph (a) of this section is understood to be that the licensee have been authorized by the Federal Communications Commission to make the facilities changes in question for the purpose of mitigating the effects of Cuban interference, but not that such authorization necessarily have been issued in the explicit form of an STA. The Commission will act accordingly in determining whether applicants meet the requirements of Section 7(b) of the Act.

§ 1.1708. Compensable costs.

(a) The following costs are compensable under Section 7 of the Radio Broadcasting to Cuba Act, up to but not exceeding $250,000:

(1) The original cost of existing equipment used by the applicant for the operation of the affected station that it is necessary to replace by facilities specially authorized by the Federal Communications Commission in order to mitigate the effects of interference from Cuba, less the amount of depreciation on such existing equipment previously reported as deductions on Federal income tax returns;

(2) Technical and engineering cost associated with the facilities changes so authorized. The costs allowable under this paragraph (2) shall include costs prudently incurred in planning, designing, engineering and testing such new facilities, and in performing monitoring required by § 1.1704(b), or monitoring performed by licensees who submitted the results to the Commission in support of their applications for authorizations to change facilities to mitigate Cuban interference that were granted before March 15, 1984.

(b) The following costs are not compensable:

(1) The cost of acquiring, constructing or installing the new facilities authorized by the Commission, apart from the associated technical and engineering costs that are compensable under paragraph (a)(2);

(2) Remuneration or expenses paid to persons, such as the station engineer, who are in the regular employ of the applicant; provided that this shall not bar compensation for out-of-pocket outlays for payments to such employees for overtime work on the tasks listed in § 1.1708(a)(2);

(3) Attorney's fees;

(4) The costs of acquiring title or leasehold interests in land; and

(5) Any part of costs incurred for the purpose of extending the interference-free service of stations beyond the area to which the existing affected station would provide interference-free service if the Cuban interference were not present.

§ 1.1709. Requirements for filing applications for compensation.

(a) This section states the requirements for filing applications for compensation for expenses incurred in mitigating the effects of Cuban interference that are filed pursuant to this Subpart M. Applications for authorization by the Federal Communications Commission to make changes in authorized station facilities are governed by other applicable provisions of the FCC rules.

(b) Applications for compensation may be filed on or after the entry into effect of this Subpart M, by the licensees of AM broadcast stations in the United States who simultaneously file or had previously filed applications for authorization to change licensed station facilities in order to mitigate the effects of interference received from stations in Cuba. Applications shall be filed with the Secretary to the Federal Communications Commission, Washington, D.C. 20554.

(c) Applications for compensation need not use any particular form, but shall contain all the information required under this Subpart M, and any supplemental information the Commission may request the applicant to file. When initially submitted, the applications need not be accompanied by the evidence of duration of interference required by

§§ 1.1704(b) and 1.1705, or the proof of costs required by § 1.1709(f) that applicants file after the facilities changes have been completed.

(d) Applications for compensation, when initially filed, shall be accompanied by:

(1) A statement, with supporting breakdown, of the actual costs of constructing or acquiring and installing replaced equipment prescribed in § 1.1708(a)(1);

(2) A statement of the amount of depreciation on such replaced equipment previously reported as deductions on Federal income tax returns; and

(3) An estimate, with supporting breakdown, of the technical and engineering costs prescribed in § 1.1708(a)(2) prudently incurred and expected to be incurred in planning, designing, engineering and testing the new or changed facilities used to mitigate the effects of Cuban interference, but not including the cost of the new facilities themselves.

(4) A statement, with supporting breakdown, of the costs incurred and expected to be incurred in making the showing of duration of Cuban interference required under § 1.1704(b), from which the applicant is not exempted under § 1.1706.

(e) The data concerning duration of interference required by §§ 1.1704(b) and 1.1705 may be submitted in a supplemental filing for association with a previously filed application for compensation when the applicant completes the prescribed monitoring. However, if the applicant does not file such data within 120 days from the date of the filing of the application for compensation, or within such extended period as the Commission may for good cause permit, the application will be returned. In such case, any priority accrued under § 1.1710 will lapse; and if the application is subsequently refiled, it will be treated as a new application under § 1.1710(c).

(f) Upon the completion of facilities changes authorized to mitigate the effects of Cuban interference, applicants for compensation shall submit to the Federal Communications Commission a detailed financial statement of the out-of-pocket expenditures made for services and replaced equipment that are compensable under § 1.1708. The statement shall be supported by accompanying receipted bills, cancelled checks, and such additional evidence of actual and prudent outlays for such compensable kinds of services and equipment as the Commission may request in individual cases.

§ 1.1710. Priorities.

Because it is not possible to foresee the extent to which interference by Cuban stations may be experienced, and because it is therefore uncertain whether the available funds will be sufficient to cover all the allowable compensation payments to all qualifying applicants, the following priorities are established for eligibility for compensation payments, in order to provide an equitable basis for the distribution of available funds:

(a) *First Priority:* Applicants whose authorizations of facilities changes to mitigate Cuban interference were issued by the Federal Communications Commission prior to October 4, 1983 (the date of the enactment of the Radio Broadcasting to Cuba Act) and whose applications for compensation are filed before October 1, 1984 (the date Section 7 of that Act enters into effect). Within this first priority group, priority will be accorded in the order in which such authorizations were granted.

(b) *Second Priority:* Applicants whose authorizations of facilities changes to mitigate Cuban interference were issued on or after October 4, 1983 and before the effective date of the regulations adopted in this Subpart M, and whose applications for compensation are filed no later than October 1, 1984. Within this second priority group, priority will be

accorded in the order in which the applications for authorization to make such facilities changes are filed with the Federal Communications Commission.

(c) *Third Priority:* Applicants who do not come within the first or second priority groups, and applicants whose priorities as a member of the second group have lapsed under § 1.1709(e). Within this third priority group, priority will be accorded in the order of the filing or refiling of applications for compensation that contain substantially all the information.

(d) The effect of the priority sequencing of applicants established under paragraphs (a) through (c), of this section, is governed by the fact that the responsibilities for processing and evaluating applications, and for making the compensation payments, have, by statute, been divided between the FCC and the USIA. While the FCC will initially receive, process and evaluate applications for compensation, the USIA has been designated by the Act as the agency that will make the payments, and to whom appropriations for this purpose will be made. In these circumstances, the matter of priority standing of applicants for compensation will be dealt with as provided in paragraph (e) of this section.

(e) The FCC will determine the priority group in which each applicant for compensation falls and the applicant's priority within that group, and will inform USIA and the applicant of that determination. However, the FCC does not administer the compensation payments or control the funds appropriated for those payments. The authority to perform those functions having been conferred by statute upon the USIA, it is for USIA to determine the manner in which the priorities established by the FCC are applied in practice in the administration of the compensation funds entrusted to the USIA. Accordingly, such questions as whether all applicants within a particular priority group who are found by the FCC to qualify for compensation will receive such compensation fully before any applicants in a lower priority group, or whether available funds (if inadequate to cover all qualifying applicants) will be pro-rated in some fashion among members of the same priority group, or otherwise, will be for the USIA to decide, taking into account the amounts of appropriated funds and the demand for them.

§ 1.1711. Provisional and definitive findings of eligibility.

(a) As soon as practicable after the filing of applications containing all the information required under § 1.1709(c), (d) and (e), the Commission will make a provisional findings as to whether the applicant meets the requirements of this Subpart M for compensation, and if so, in what estimated amount.

(b) When the facilities changes are completed and the documentation required by § 1.1709(f) is filed, the Commission will make a definitive finding as to the amount of compensation for which applicant meets the requirements of this Subpart M. Such amount shall not exceed the amount of compensation determined in the provisional finding adopted under paragraph (a) of this section.

(c) The findings reached under paragraphs (a) and (b) of this section will be adopted by order, which will be published and transmitted to the USIA and the applicant. Such findings do not constitute entitlement to compensation, which will depend upon the availability of appropriated funds and the satisfaction of such requirements as may be established by the United States Information Agency which, under the Act, is responsible for making the compensation payments.

§ 1.1712. Review of findings.

(a) Sections 0.61 and 0.283 of this chapter delegate to the Chief, Mass Media Bureau, the processing of applications for compensation under this Subpart M, and the adoption of

orders containing provisional and definitive findings as to the amount of compensation for which applicants qualify under the Radio Broadcasting to Cuba Act and the regulations in this subpart.

(b) Sections 1.101, 1.102(b), 1.103, 1.104, 1.106, 1.108, 1.110 (except the last sentence thereof), 1.113, 1.115, and 1.117 of this chapter, which relate to reconsideration and review of actions taken by the Commission and pursuant to delegated authority, and to effective dates and finality of actions, shall apply to orders making provisional or definitive findings under § 1.1711.

(c) The Commission considers that orders adopted under § 1.1711 (a) or (b) by the Commission *en banc*, but not those adopted under delegated authority by the Chief, Mass Media Bureau, are final orders subject to judicial review under Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. 402(a).

Cuban Interference, Compensation for, Mitigation of
Interference, Cuban, Compensation for, Mitigation of

Petition for reconsideration granted. Amendment of Sections 1.1708 and 1.1709 of Part 1, Subpart M of the FCC Rules and Regulations adopted relating to compensation allowable for equipment costs incurred to mitigate interference from Cuba, pursuant to Section 7 of the Radio Broadcasting to Cuba Act.
—*Cuban Interference*
MM Docket No. 84-1

FCC 84-384

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Compensation for expenses incurred in mitigating the effects of Cuban interference to services rendered by radio stations in the United States.	MM Docket No. 84-1

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 1984; Released: August 7, 1984

BY THE COMMISSION:

1. Before us is the Petition for Reconsideration filed jointly in this proceeding, on April 30, 1984, by the Florida Association of Broadcasters and the South Florida Radio Broadcasters Association. It seeks to eliminate two limitations found in sections 1.1708 and 1.1709, Subpart M, Part I of the Commission's rules, promulgated in our *Report and Order* adopted March 15, 1984 and relating to compensation payable to radio broadcasters for expenses incurred in mitigating the effects of interference from Cuban stations. Subpart M implements the compensation program provided for in Section 7 of the Radio Broadcasting to Cuba Act.[1]

2. In particular, the Petition asks that the Commission revise section 1.1708 so as to:

[1] Pub. L. No. 98-111, 97 Stat. 749 (approved Oct. 4, 1983). It will be referred to as "the Act."

> -allow compensation for so much of the cost of FCC-authorized new equipment as remains after subtracting the amount of depreciation taken on the equipment it replaces.
>
> -remove the $250,000 ceiling on allowable compensation.

3. The Petition appends supporting statements by Senator Paula Hawkins and Representative Dante Fascell, sponsors and authors of the Act, declaring that both objectives accord with the legislative intent, and seeking conforming rule changes. The United States Information Agency has now changed its position on the matter, and states on the record that it would not object to such changes. The National Radio Broadcasters Association supported the subject Petition. No opposition to it has been filed.

4. The question of legislative intent concerning the kinds of equipment costs that would be compensable arises out of an express limitation in section 7 (b) of the Act:

> Such expenses shall be limited to the costs of equipment (replaced, less depreciation) and associated technical and engineering costs.

Section 1.1708 of the Commission's Rules treated this in accordance with its literal meaning: limitation of compensable expenses to the original cost of the equipment that is "replaced, less depreciation" taken on it, plus "associated technical and engineering costs." The rule construed the latter as embracing costs incurred in planning, designing, engineering and testing the new facilities, and in performing certain monitoring of Cuban interference.

5. The legislative history of the Act contains no discussion of the reason for deducting depreciation, and no explanation of the choice of language used to provide for that deduction. There could be no question, however, that the depreciation to be deducted could only be depreciation taken for tax purposes on the old equipment that is "replaced" by new equipment (such as a higher power transmitter) needed to mitigate the effects of Cuban interference. Thus, in order to give effect to the clear mandate to deduct, from otherwise allowable equipment costs, the depreciation taken on the old "replaced" equipment, it is necessary to construe the words "equipment (replaced, less depreciation)" as referring to that old equipment.

6. We did not, when adopting Subpart M, treat the single, above-quoted reference in section 7 to equipment as intended to embrace both the old "replaced" equipment and the new equipment that replaces it. Rather, we treated the statutory language as referring only to the "replaced equipment, in keeping with the ordinary meaning of that term and the unmistakably intended exclusion from compensation of depreciation already taken on such old, "replaced" equipment that is taken out of service and idled before the end of its useful life. In doing so we gave considerable weight to the original comments of the USIA.

7. We now have the benefit of the above-mentioned statements by the authors and sponsors of the legislation and clarifying declarations found in Senate Report No. 98-514, 98th Congress, 2d Session. On page 78 of that Report, the Senate Committee on Appropriations, when referring to its recommendation of an appropriation to fund $3.5 million of the $5 million authorized in the Act for the compensation program, stated that:

> these funds shall be available only for the cost of the new or replacement equipment needed to overcome the effects of Cuban interference, less depareciation on the old equipment, and associated technical and engineering costs.

The Report also contains, on page 88, the following additional reference to compensable equipment costs:

> **Radio Marti Technical Amendment**
>
> The Committee has inserted a technical amendment to the Radio Marti authorizing bill [the above-quoted Radio Broadcasting to Cuba Act cited in footnote 1, hereto] on the provisions regarding facility compensation. This amendment (section 511) [of the appropriations measure reported out by the Committee] will bring the law into conformity with congressional intent. The current law provides compensation for the "costs of equipment (replaced, less depreciation)***." The amendment would change that to read, "costs of equipment replaced (less depreciation)***."
>
> Because of the current law, the FCC, in its proposed regulations, ruled that the facility compensation would cover the cost of the equipment being replaced rather than the cost of the replacement equipment.
>
> Congress intended otherwise. Since the stations affected by Cuban interference would not have needed any new equipment without the interference, it was the intent of Congress to insure that they did not have to bear the costs of purchasing new equipment to mitigate the effects of the interference.

Subsequently, on June 28, 1984, the Senate passed the House-originated appropriations bill H.R. 5712 with amendments providing for an appropriation of $3.5 million for the compensation program, and containing the technical amendment to the Radio Broadcasting to Cuba Act referred to in the above-excerpted portion of Senate Report No. 98-514.

8. The unequivocal statements of Congressional intent set out in the preceding paragraph, and in the declarations by Senator Hawkins and Representative Fascell that seek conforming amendment of the rules adopted in the *Report and Order* under reconsideration in this proceeding leave no question that the Commission is called upon to treat the portion of section 7 of the Act quoted in paragraph 4, above, as if it read: "Such expenses shall be limited to the costs of new equipment less depreciation taken on the equipment it replaces."[2]

9. Senate Report No. 98-514 also addresses the question of a ceiling on the amount of cost compensable in individual cases. Petitioner asks that

[2] Congress did not provide for any adjustment to compensation to reflect the scrap or resale value of the replaced equipment. We note that licensees may wish to retain the replaced equipment for use at such time as the Cuban interference may cease.

we remove the $250,000 ceiling imposed by section 1.1708 of the Rules. Both Senator Hawkins and Representative have declared, in statements that are part of the record of this proceeding, that Congress intended that the allowable costs of Commission-approved facilities changes to mitigate the effects of Cuban interference be fully compensated. Concerning this, the new Senate Report states, on page 78:

> Also, because the impact of interference on AM broadcast stations varies with factors such as location, frequency, and power of both the station interfered with and the station commiting the interference, no ceiling should be established to limit the amount of compensation an individual AM station can apply for or receive, provided that the total claims do not exceed the authorized amount.

10. In view of the statements of Congressional intent that have been made part of the record of this proceeding, and the Congressional policy expressed in the above-quoted portion of the Report submitting the Senate Appropriations Committee's recommendation of an appropriation to fund the subject compensation payments, we find it appropriate to remove the ceiling on compensation provided for in the rules adopted in the *Report and order* under reconsideration.

11. Subpart M of our Rules, which provides the requirements and procedures for filing and processing applications for compensation under the Radio Broadcasting to Cuba Act, enters into effect on August 1, 1984. It would cause needless burdens and complications for both the Commission and applicants if the amendments we adopt today are not effective by that date. This arises in part out of the system of priorities established in section 1.1710. That system is governed in part by filing dates, the first of which is the period between August 1 and October 1, 1984. In order to validate applications filed within that period that conform with the rules as we are now amending them (rather than with the original provisions that the amendments remove), it is necessary that the amendments enter into effect no later than August 1, 1984.

12. This necessitates invoking applicable exceptions in section 553 (a)(1) and (3) of the Administrative Procedure Act to the general requirement that substantive rules not enter into effect less than thirty days after the date of their publication. In the circumstances already noted, the rule amendments we are adopting today come within the exceptions applicable when the rule relieves a restriction and when the agency finds good cause for dispensing with 30-day advance publication. The amendments relieve the restriction in the previous rule against the allowance of compensation for any part of the cost of new equipment, and lift the former $250,000 ceiling. Also, we find that the above-stated circumstances constitute good cause for excepting the appended rule amendments from the generally applicable requirement of publication no less than 30 days before entry into effect.

13. Accordingly, pursuant to authority found in Section 7(c) of the Radio Broadcasting to Cuba Act, Pub. L. NO. 98-111, 97 Stat. 749, Section 405 of the Communications Act of 1934, as amended 47 U.S.C., Sec. 405, and Section 553 (d)(1) and (3) of the Administration Procedure Act, 5 U.S.C. Sec. 553 (d)(1) and (3), IT IS ORDERED That, the subject Petition for Reconsideration IS GRANTED.

14. IS FURTHER ORDERED, That, pursuant to the authority cited in paragraph 13 hereof, sections 1.1708 and 1.1709 of the Commission's Rules ARE AMENDED, effective August 1, 1984, to read as provided in Appendix A hereto.

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

WILLIAM J. TRICARICO *Secretary*

Appendix A

Sections 1.1708 and 1.709 of Subpart M, Part 1 of the Rules and Regulations of the Federal Communications Commission, 47 CFR Chapter I, are amended as follows:

1. In section 1.1708, the introductory language and subparagraph (1) of paragraph (a) are amended to read:

(a) The following costs are compensable under section 7 of the Radio Broadcasting to Cuba Act:

(1) The prudently incurred cost of acquiring, installing, or constructing facilities specially authorized by the Federal Communications Commission for the purpose of mitigating the effects of interference from Cuba, less the amount of depreciation on equipment replaced by such specially authorized facilities that was reported in previously filed Federal income tax returns.

* * * * *

2. In paragraph (b) of section 1.1708, subparagraph (1) is removed, and subparagraphs (2), (3), (4) and (5) are redesignated as (1), (2), (3) and (4), respectively.

3. In section 1.1709, paragraph (d) is revised to read as follows:

* * * * *

(d) Applications for compensation, when initially filed, shall be accompanied by a statement, with supporting breakdown, of:

(1) The costs incurred, or the estimated costs expected to be incurred, for equipment and services that are compensable under section 1.1708 (a); and

(2) The amount of depreciation on replaced equipment that is deductible from compensation under section 1.1708(a).

* * * * *

4. In section 1.1709, the first sentence of paragraph (f) is amended to read:

* * * * *

(f) Upon the completion of facilities changes authorized to mitigate the effects of Cuban interference, applicants for compensation shall submit to the Federal Communications Commission a detailed financial statement of the out-of-pocket expenditures made for the equipment and services whose costs are compensable under section 1.1708.

* * * * *

Comparative Coverage Issue
Diversification, of Control of Mass Media
Merger
Ownership and Management, Integration

In hearing matter of mutually exclusive CP applications for television station, Review Board reversed A L J's grant and awarded it to competing applicant. Two applicants who merged into one applicant entity after hearing were not allowed to improve their comparative qualifications. Winning applicant awarded comparative preferences under diversification and coverage criteria.
—*Daytona B/cing Co., Inc.*
BC Docket No. 81-262

FCC 84R-23

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
DAYTONA BROADCASTING COMPANY, INC. Daytona Beach, Florida	BC Docket No. 81-262 File No. BPCT-800811KE
LIFE STYLE BROADCASTING, INC. Daytona Beach, Florida	BC Docket No. 81-263 File No. BPCT-800811KF
DAYTONA BEACH TELEVISION ASSOCIATES, LTD. Daytona Beach, Florida	BC Docket No. 81-265 File No. BPCT-800811KH
For a Television Construction Permit	

Appearances

Vincent A. Pepper and *Peter Gutmann* on behalf of Daytona Broadcasting Company, Inc.; *Lawrence N. Cohn* and *Mark L. Pelesh* on behalf of Life Style Broadcasting, Inc.; *Joseph M. Morrissey, Jonathan D. Blake* and *Joseph A. Godles* on behalf of Daytona Beach Television Associates, Ltd.; and *Charles E. Dziedzic, Y. Paulette Laden* and *Joseph A. Belisle* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

Decision

Adopted: April 13, 1984; Released: April 20, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. We have before us the three mutually-exclusive applications of Daytona Broadcasting Company, Inc. (DBC), Life Style Broadcasting, Inc. (Life Style), and Daytona Beach Television Associates, Ltd. (DBTA) for authority to construct a new commercial television station to operate on channel 26 at Daytona Beach, Florida. By *Hearing Designation Order* (*HDO*), 46 Fed. Reg. 24296, published April 30, 1981, the applications of DBC, Life Style, and five other original applicants were designated for consolidated comparative hearing. Of the latter five applicants, three had their applications dismissed voluntarily by the ALJ pursuant to acceptable settlement agreements[1]; the remaining two original applicants, Daytona Beach Television Corporation and Daytona Beach Family Television, Inc. merged after hearing into an entirely new entity, DBTA, now the third remaining applicant in this proceeding. This post-hearing merger is illuminated in the orders approving the merger. FCC 82M-2201, released July 19, 1982 (ALJ), *aff'd*, FCC 82R-51, released August 18, 1982 (Rev. Bd.), *recon. dismissed*, FCC 82R-56, released September 20, 1982. The comparative treatment of the merged entity is discussed at paras. 4-8, *infra*.

2. In an *Initial Decision* (*I.D.*), FCC 83D-27, released April 25, 1983, presiding Administrative Law Judge John M. Frysiak (ALJ) resolved air hazard issues in favor of DBC and Life Style; concluded that a short-spacing issue specified originally against Daytona Beach Television Corp. (one of the merged DBTA applicants) was mooted by the merger because the newly-formed applicant, DBTA, specified the engineering proposal of the other merged applicant, Daytona Beach Television, Inc.; and selected DBTA as the best comparative applicant under the standard comparative issue. The ALJ's ultimate comparative analysis turned on the Commis-

[1] *Memorandum Opinions and Orders*, FCC 82M-0266, released January 26, 1982; FCC 82M-0386, released February 5, 1982; and FCC 82M-0579, released February 23, 1982.

sion's ownership integration criterion, under which he awarded DBTA moderate preferences over Life Style (the second ranked applicant under this criterion) and DBC. The ALJ also awarded Life Style a slight comparative preference over DBC and DBTA for proposing to serve a greater population. Finally, both DBTA and Life Style received a slight comparative preference over DBC on the diversification of media ownership criterion. As between Life Style and DBTA, both were found equal under diversification.

3. This proceeding is now before the Review Board on exceptions filed by all of the applicants. DBC's exceptions relate largely to the prior rulings permitting the post-hearing DBTA merger. The bulk of the remaining exceptions challenge the ALJ's conclusions under the comparative coverage, ownership integration, and media diversification criteria of the standard comparative issue, while DBTA argues that the ALJ erred in failing to add misrepresentation and lack of candor issues against Life Style. Moreover, Life Style has filed a petition to enlarge issues against DBTA alleging media ownership problems in the DBTA application. The Board has reviewed the *I.D.* in light of the exceptions, the oral argument held on September 15, 1983, the supplemental briefs requested by the Board, and our independent examination of the record. We generally adopt the findings of fact in the *I.D.*, except as specifically modified herein, but reverse certain of the ALJ's dispositive conclusions and hold that a grant of Life Style's application would best serve the public interest.

Comparative Status of DBTA

4. As noted at the outset, DBTA is a composite entity formed by the post-hearing merger of two of the original (seven) applicant corporations[2] — Daytona Beach Family Television, Inc. (Family) and Daytona Beach Television Corp. (DBTC). *I.D.*, para. 5. DBTC is to be the general partner of DBTA. Prior to merger, DBTC proposed 30% full-time integration, and its principals had no other media interests; DBTC now holds a 60% equity interest in the composite DBTA. Family, which had not proposed any ownership participation in station management, but did own other media interests, is now the limited partner (with a 40% equity interest) in DBTA. *Id.*, at para. 24. The post-hearing DBTA merger was the subject of heated litigation at an interlocutory phase of this case wherein other applicant parties flatly opposed approval of the post-hearing merger. The ALJ had approved the merger, *see id.*, at para. 5, subject to the important condition

[2] The hearing was held and the hearing record closed on April 6, 1982. *I.D.*, para. 6. The DBTA merger agreement was submitted for approval to the ALJ on April 30, 1982 ("Joint Petition"), *see* DBC Exceptions at 2, and followed by a petition for leave to amend the respective applications to conform to the agreement filed by the merging parties on May 3, 1982.

that no comparative "upgrading" ensue to the prejudice of the other applicants.[3] On that limited basis, the Board affirmed the ALJ's approval of the Family/DBTC merger.[4] While the exceptions to the *I.D.* continue, in varying degrees, to argue the correctness of these prior rulings approving the merger,[5] we will not retraverse this same ground nor review that which was already decided in those prior rulings.[6]

5. Although we here accept the merged DBTA entity as a *fait accompli*, we do not deny that the post-hearing changes in the characteristics of the composite applicant complicate somewhat the consequent comparative analysis of DBTA *vis-a-vis* the other applicants. Moreover, while the DBTA merger and conforming application amendments were approved subject to the routine condition that the merged applicant(s) not achieve any comparative "upgrading" as a reconfigured entity, we do concede that such a cautionary condition is frequently easier to state in the abstract than to interpret or apply later on in the specific; its ultimate meaning must frequently depend on context. *See, e.g., Peoples Broadcasting Corp.*, 92 FCC 2d 1305, 1321-1325 (Rev. Bd. 1983) (amendment reporting death of integrated principal and son's accession to equity interest accepted by ALJ subject to no "upgrading"; son's interest later credited), *recon. denied*, 94 FCC 2d 429, *review denied*, FCC 83-594, released December 15, 1983 (Comm'n). Nonetheless, the customary conditioning of the recognition of actual changes in an original application on a caveat against later comparative "upgrading" is a pivotal device used in the harmonization of several lines of the layered licensing process. As we discuss more fully in our rather extended discussion of the appropriate consideration of "changed circumstances" (*see infra* paras. 19-24), the larger comparative licensing process — *i.e.*, from the vestiture of *Ashbacker* rights[7] in mutually-exclusive applicants to the ultimate license grant — must, *inter alia*, concordantly meld two parallel objectives: it must (a) assure that pertinent information anent the applicants has continuing validity so that decisions are structured on a factual foundation[8] while (b) simultaneously assuring that no applicant is permitted to "upgrade" its application relative to its competitors after the legal

[3] *See Memorandum Opinion and Order*, FCC 82M-2201, *supra*, at paras. 10, 12; *I.D.*, n.9.

[4] The reasons for the Board's affirmation were set forth in its *Orders*, FCC 82R-51 and FCC 82R-56, *supra*.

[5] *See, e.g.*, DBC Exceptions at 1-20.

[6] DBTA makes a legitimate point in its June 21, 1983 motion to strike when it asserts that the continuation of such arguments is procedurally infirm. *See* 47 CFR §1.291(c)(3) barring reconsideration of interlocutory rulings. However, to the extent that the exceptions repeat such arguments merely to preserve appeal rights (*see* DBC Exceptions at n.1), we will not formally strike, but will not rule on, these exceptions.

[7] *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945).

[8] *See, e.g.*, 47 U.S.C. §1.65 and the "changed circumstances" cases cited in para. 21, *infra*.

deadline has expired for amending (or otherwise improving) an accepted application.

6. Ever since the Supreme Court's landmark decision in *Ashbacker* affording consolidated comparative hearing rights to mutually-exclusive applicants for limited radio spectrum space, the bar against comparative "upgrading" after the expiration of a predetermined date has become an integral component of the multi-leveled competitive licensing process.[9] First, the bar against "upgrading" is indispensable to the assurance of full and fair notice to (actual or potential) competing applicants of the make-up and the potential strength of the proposals of a mutually-exclusive adversary. Broadcast licenses are awarded on the basis of relative competitive merit in accordance with the criteria set forth in the Commission's comparative *Policy Statement, supra* note 9; and, to be blunt, comparative licensing proceedings conducted under the *Policy Statement* are far too exhaustive and expensive to allow an applicant to be drawn deeply into a competition for the license, only to be confronted by a competitor whose comparative position has been improved *post hoc* by decisionally significant changes in its ownership structure or its broadcast proposals. In short, the long-standing bar against "upgrading" an application after a predetermined deadline is imperative to prevent the comparative licensing process from becoming an extravagant analogue of "Blindman's B[l]uff." An applicant's general comparative profile must be laid bare in its application; and once a case has been designated for hearing, an applicant may not amend its application absent a showing of "good cause." 47 CFR §73.3522.[10] The taboo against "upgrading" once a case has gone to hearing is both equitable and venerable. The second vital reason for barring comparative "upgrading" after the expiration of a predetermined date is the pragmatic necessity alluded to hereinbelow in our discussion of the doctrine of "administrative finality" (*see infra*

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[9] This paragraph explicating the necessity of a procedural bar against comparative "upgrading" will be superfluous (and pedantic) to the *cognoscenti* of communications law: they may safely proceed to the succeeding paragraphs. To those less familiar with the unique vicissitudes of the comparative process, the "truths" about "upgrading" - unlike Mr. Jefferson's - may not be "self evident," and there may be those initially seduced by DBTA's platitudinous proposition that the Commission should recognize improvements in an applicant's proposal *whenever* these occur because, in the final analysis, "the ultimate grant would go to an applicant who would offer ultimately the best service to the public under the guidelines of the [*Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965)]. Tr. of Oral Arg., September 15, 1983, at 303. For any titillated by DBTA's expansive pitch, this paragraph may be required reading.

[10] The six-point "good cause" was set forth in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140 (Rev. Bd. 1970). The six-points are (1) due diligence; (2) involuntariness; (3) the lack of need for the addition of new hearing issues; (4) no disruption of hearing process; (5) no prejudice to other applicants; (6) *no comparative "upgrading."* *See also Athens Broadcasting Co., Inc.*, 37 FCC 2d 374 (Rev. Bd. 1972).

paras. 21-24). If opposing applicants could continually "upgrade" their individual applications, even *after* a comparative hearing has commenced (or, as in this case, terminated), there simply could be no consolidated *comparative* hearing within the contemplation of *Ashbacker*. Obviously, without a predetermined date after which applications could not be amended freely, there could *never* come a decisional point before the Commission at which applicants could be mutually contrasted on a static basis. In fact, the comparative hearings demanded by *Ashbacker* would become substantively meaningless since the very purpose of the hearing is to test in an evidentiary crucible the competing proposals originally set forth in the respective applications. Hence, over the last several years, the Board has attempted to alloy with chromium steel the procedural bar against comparative "upgrading" by the submission of untimely amendments.[11]

7. Having approved the DBTA merger on the express precondition that neither of its constituent applicants (nor the successor DBTA) accomplish a relative "upgrading," the Board must now assess DBTA's comparative positions on ownership integration and media diversification in accordance with that absolute precondition. There seems no direct precedent to guide us in this task because apparently — as DBC asserts — "[t]he Commission has never before allowed a merger in a proceeding for a new broadcast license which did not terminate the comparative aspect of the case."[12] And, it is acknowledged that in now comparatively assessing the corporate DBTA, we are presented something akin to beholding "The Three Faces of Eve." That is, from a purely analytical perspective, is the applicant currently before us for comparative measurement to be regarded as (a) the 30% owner-integrated DBTC,[13] but with Family's transmitter site, but also with Family's other pre-merger media interests; (b) Family, but with DBTC's integrated ownership structure; or

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[11] *See, e.g., Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983), *review denied*, FCC 84-119, released April 2, 1984 (Comm'n); *Las Misiones de Bejar Television Co.*, 93 FCC 2d 191, 196 (Rev. Bd. 1983), *review denied*, FCC 84-97, adopted March 15, 1984 (Comm'n) (Public Notice No. 17902, released March 16, 1984); *Chudy Broadcasting Corp.*, 93 FCC 2d 1213 (Rev. Bd. 1983); *Birmingham Family Television*, 91 FCC 2d 348 (Rev. Bd. 1982); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 843 (Rev. Bd. 1981), *remanded on other grounds*, FCC 83-159, released April 13, 1983 (Comm'n) (remanded to consider "changed circumstances"). *See also American Radio-Telephone Service, Inc.*, 93 FCC 2d 1138, 1141-1143 (1983), in which the Commission iterated what we've said about "upgrading" and firmly held that — even in cellular mobile hearings where special expedited proceedings are utilized — mergers are generally controlled by our ordinary application amendment rules.

[12] DBC Exceptions at 1. *But cf. American Radio-Telephone Service, supra* note 11.

[13] Actually, DBTA's 30% integration factor recently has been reduced to 20% due to the withdrawal of a 10% general partner. *See* DBTA Petition for Leave to Amend, filed March 21, 1984. *See also infra*, para. 11.

(c) DBTA, a wholly new applicant inheriting *all* of the engineering, ownership, and other media characteristics of the pre-merger constituent applicants. In his analysis, the ALJ opted basically for mode (c), above, but his option choice also incorporated what in another context might have been termed a "limited modified hangout." To wit, he credited DBTA with both a 30% integrated ownership structure (inherited from DBTC) and with a qualifying transmitter site (inherited from Family); he did not, alas, fully charge against DBTA the other media interests of the principals of Family because — within a the new DBTA corporate structure — the Family applicant is now merely a limited partner. *I.D.*, para. 42.[14]

8. Irrespective of which of the three analytical modes (described in the previous paragraph) is used to assess the DBTA applicant(s), we find that the ALJ's treatment of the transmitter site matter and the computation of its integration allowance is congruent with the reasoning of our *Order* affirming the ALJ's approval of the merger. *See* FCC 82R-51, *supra* note 4. We accordingly affirm those aspects of the *I.D.*.[15] Conversely, as we later address more fully under our treatment of the ownership diversification element of this case (*see infra* para. 15), we find that the failure to fully charge DBTA with the media interests of the Family principals of the merged entity was clear error, and that this error permitted DBTA an impermissible comparative "upgrading." Although the Board held in

[14] The ALJ stated that because Family's principals were now limited partners in the merged corporation, DBTA's "media interests herein are not of sufficient weight to affect DBTA's status under the diversity criterion." *I.D.*, para. 42. He cited as a basis for this determination the Board's decision in *Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd. 1982) (only slight weight given under diversification criterion to preferred stock interests of principals), *review denied*, FCC 83-235, released May 18, 1973 (Comm'n). *See also* FCC Report No. 17923 (New Release, March 30, 1984) announcing revision of FCC rules to provide that other media interests of limited partners are not cognizable under multiple ownership rules.

[15] We do stress, however, that our approval of the DBTA merger, and our affirmation of the ALJ on the points relevant thereto, are narrowly based on the particular factual development of this case. *Cf. The Old Time Religion Hour*, 54 RR 2d 989, 922-993 (Rev. Bd. 1983), *recon. denied*, 55 RR 2d 424. It is most definitely not to be inferred that the Board intends in conventional comparative cases to approve post-designation mergers in which the constituent applicants attempt, in the manner of a smorgasbord, to incorporate the superior characteristics of the individual merging applicants which selectively "upgrade" the merged entity. (We have allowed this unorthodox approach only in special 90-day proceedings to select interim licensees, *see Global Broadcasting Group, Inc.*, 92 FCC 2d 114 (Rev. Bd. 1982), *aff'd*, FCC 83-494, released October 28, 1983 (Comm'n); however, all parties to such special interim licensing cases have been put on *express* notice of this departure at a pre-comparative stage, and encouraged to merge to strengthen their positions. There are no ordinary evidentiary hearings in such special interim proceedings.) Post-designation amendments in hearing cases continue to be governed, of course, by §73.3522 of the Rules. Should our approval of this instant post-designation merger create unforeseen comparative problems down the line, we have no compunction about revisiting this matter with an eye toward rectification.

Cleveland Television, supra note 14, that media interests of non-voting stockholders are of merely slight weight for comparative purposes, *see* 91 FCC 2d at 1139,[16] our approval of the instant DBTA merger was specifically conditioned on the caveat that no "upgrading" result. FCC 82R-51, *supra,* at para. 2. The other media interests of the Family principals of DBTA were squarely attributable to Family and its individual principals prior to the merger. Even crafting the limited partnership device for the Family members of DBTA, DBTA cannot subsequently merge away media interests which were fully chargeable to its principals throughout the entire hearing process. If ever there was a glaring example of an attempted post-hearing "upgrading," DBTA's instant reformation of the erstwhile Family media interests into a limited partnership form is *it.* The media interests of the individual Family principals of DBTA remain cognizable in a manner *identical* to the pre-merger status of those interests. *See generally Muncie Broadcasting Corp.*, 89 FCC 2d 123, 129-130 (Rev. Bd. 1982), *recon. denied,* 89 FCC 2d 1331, *review denied,* FCC 83-234, released May 19, 1983 (Comm'n).[17]

Comparative Elements

9. *Integration of Ownership and Management.* The *I.D.* credits DBTA with 30% full-time and no part-time integration, Life Style with 7.2% full-time and 12% part-time (24 hours per week) integration, and DBC with no full-time and 80% part-time (20 hours per week) integration. *I.D.*, paras. 45-47. Both DBTA and Life Style received enhancement credit for local residence, civic participation and female ownership. *Id.*, at paras. 15, 17-22, 27-29, 46-47. Life Style and DBC also were awarded enhancement credit for broadcast experience, and Life Style received additional credit for minority participation. *Id.*, at paras. 11, 15, 45-46. The ALJ awarded DBTA a moderate preference over Life Style for integration based on the quantitative full-time advantage enjoyed by DBTA, the greatest percentage of which (at that time 30%) was qualitatively enhanced. *Id.*, at para. 48. Life Style received a slight preference over DBC because all of DBC's proposed integration was part time. *Id.*

10. Life Style excepts to the ALJ's award of a moderate preference to DBTA, arguing that even if DBTA gets credit for its higher percentage of

[16] *But see* Statement Concurring *Dubitante,* 91 FCC 2d at 1144. (Bd. Mb'r Blumenthal) (recognizing non-attribution of non-voting interests under prophylactic limits of multiple ownership rules but questioning whether such interests are *comparatively* cognizable, particularly where "cross-interest" policy is implicated).

[17] In *Muncie Broadcasting,* citing a long line of anti-"upgrading" cases, the Board refused to recognize for comparative purposes the post-hearing sale of an AM broadcast station by one of the applicants. Our action therein plainly cannot be reconciled with the ALJ's non-recognition of the post-designation revision of Family's (or DBTA's) previously chargeable media interests.

full-time integration, the overall qualitative preference should only be slight. DBC, in turn, contends that its proposal deserves more credit than either of its competitors because only its proposal will integrate a majority of its stock, albeit on a part-time basis. As noted *supra*, both DBC and Life Style claim that the ALJ permitted DBTA a comparative "upgrading" through the merger and would reduce the integration credited to DBTA by limiting it to the current ownership held by the DBTA general partner; that is, they would multiply the 30% full-time credit awarded DBTA by a factor of 60%, the amount held by the general partner of DBTA, to arrive at a figure of 18%. Ever-dogged, DBC would further reduce this percentage by also factoring in the total equity interests of the non-voting stock held by the general partner.

11. We agree with Life Style that DBTA is entitled to only a slight preference over it and DBC, and find that Life Style is preferred (however slightly) over DBC. We will, however, reject suggestions to reduce DBTA's integration credit to 18% (or less) by recognizing only that percentage owned by the general partners or the equity interests of the non-voting partners. Instead, DBTA will be awarded integration credit for the total percentage of its general partners who plan to work at the proposed facility. Not only does that integration level reflect the legal authority and voting power possessed by the general partners to implement station policy (*see, e.g., Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506 (Rev. Bd. 1982)), but that ownership integration level did not increase as a result of the merger. However, DBTA's integration credit now must be reduced from 30% to 20% full-time to reflect Susan S. Root's withdrawal from DBTA. *See New Continental Broadcasting Co., supra* note 11, 81 FCC 2d at 842-844; *Nuance Corp.*, 85 FCC 2d 412, 418 (Rev. Bd. 1981). Mrs. Root, a 10% stockholder of DBTA's general partner, made her departure from DBTA effective March 15, 1984. *See supra* note 13. After this uprooting, DBTA will receive a 20% full-time credit to Life Style's 7.2% full-time and 12% part-time credit. Comparatively, we have previously held that an applicant proposing 25% full-time integration is entitled to only a slight preference over an 11% full-time integrated applicant where both applicants are qualitatively enhanced. *Gilbert Group, Inc.*, 88 FCC 2d 401 (Rev. Bd. 1981). We perceive no meaningful difference between that case and the one before us: the respective percentage disparities are comparable (14% full-time versus 12.8% full-time and 12% part-time). As for DBC, its 80% part-time credit does not quite reach the level of Life Style's proposal to integrate 7.2% of its ownership on a full-time basis and 12% on a part-time basis, particularly where Life Style's 7.2% stockholder is a local resident, will be the general manager, and has extensive broadcast experience. *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018 (Rev. Bd. 1981), relied

upon by DBC to support its contention that significant part-time integration may outweigh a lesser full-time proposal, does not dictate a contrary result. That case stands for the proposition that 40% *substantial time* (*i.e.*, 30 hours per week), coupled with 18% part-time integration, will slightly edge out 10% full-time integration. *See Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 956 (Rev. Bd. 1982) ("... full-time and substantial participation are of disproportionate significance in evaluating integration credit.") *See also Broadcasting Communications, Inc.*, 93 FCC 2d 1162, 1173 (Rev. Bd. 1983), where we accorded far greater weight to substantial time than is generally accorded part-time. The *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965), states: "To the extent that the time spent moves away from full time, the credit given will drop sharply." Thus, Life Style's full-time credit, coupled with its 12% part-time factor appears slightly superior, although we concede that we are here calibrating in millimicrons.

12. *Diversification of Control of the Media of Mass Communications.* The ALJ attributed other mass media interests to certain principals of all three applicants. Commencing with Life Style, he charged two of its principals with media interests: E. J. Daniels, an 18% shareholder, and Richard Y. Clark, a 7.2% shareholder. *I.D.*, paras. 14, 41.[18] Daniels owns both a publishing company that produces religious books, magazines and pre-prints within the proposed service area, and interests in four weekly advertising shoppers distributed within 120 miles of Daytona Beach. *Id.* He is also an editor of *Christ For the World Family Magazine*, published in Orlando, Florida (circulation 34,000). *Id.*, at para. 14. Next, at the time of the release of the *I.D.*, Clark was a court-appointed receiver for station WDAT, Ormond Beach, Florida. *Id.*[19] When Clark was appointed receiver, he pledged disassociation from WDAT if Life Style's application were granted. *Id.*, at n.7. As to DBC, Anthony C. Kupris (an 80% DBC shareholder) was credited by the ALJ with the following ownership: television station WMBB, Panama City, Florida; a 6% limited partnership interest in the permittee for UHF television station in Little Rock, Arkansas; and a television translator station in Tallahassee, Florida. *Id.*, at paras. 10, 40. With respect to DBTA, both Doctor R. Crants, Jr. and Farrell B. Jones (principals of Family, now the 40% limited partner of

[18] The ALJ correctly disregarded the CATV interest of Life Style principal J. Kermit Coble because the interest was subject to an express divestiture condition in para. 11 of the *H.D.O. See I.D.*, n.7. Where an applicant is committed prior to hearing to divest another media interest, that commitment will be recognized. *See generally Muncie Broadcasting, supra*, 89 FCC 2d at 129-130.

[19] On April 29, 1983, the Commission granted an application to assign station WDAT from Clark to Hale Communications, Inc. The transaction was consummated by the parties on May 11, 1983. *See* Life Style Petition for Leave to Amend and Amendment filed June 13, 1983.

DBTA) were charged with other media interests. Crants, a 21.75% shareholder of Family (but 43.5% at the amendment cut-off date), was at the time of the *I.D.*, the controlling shareholder of the general partner of a permittee of a new UHF television station in Springfield, Missouri, as well as a 33 1/3% owner of the permittee of a UHF television station in Knoxville, Tennessee. *Id.*, at paras. 31, 42.[20] Crants was also charged with a 15% interest in a corporation which, in turn, is a 40% partner in the permittee of a new television station in Canton, Ohio. He was also charged with his wife's 10.9% interest in the permittee of a new FM station in Fayetteville, Arkansas. *Id.*, at para. 42. Finally, Jones was at times pertinent herein also a limited partner in the aforementioned Springfield, Missouri UHF television station. *Id.*, at para. 31.

13. The ALJ concluded that the interests of both Life Style and DBTA were not significant and that neither was entitled to a preference over the other. *Id.*, at para. 42. Both applicants, however, were awarded a slight diversification preference over DBC. *Id.* With respect to DBC, the ALJ found that Kupris' interest in television station WMBB, Panama City, Florida was significant because Kupris controlled both DBC and television station WMBB, both located in Florida, *id.*, at para. 40, but he characterized Kupris' translator interest as of little significance. *Id.* As to Life Style, the ALJ found Daniels' publishing interests to be not of the type with which the *Policy Statement* diversification criterion is concerned. *Id.*, at para. 41. He reasoned that Daniels' publishing company has no editorial control over the material printed and that the advertising shoppers have no editorial content. *Id.* The ALJ further held that Clark's interest as a receiver of station WDAT was immaterial since he was acting as an agent of the court and the interest would disappear if Life Style were here successful. *Id.* Finally, as noted *supra*, para. 7, the ALJ found the interests of the DBTA principals not of sufficient weight to affect DBTA's status under diversification because the media interests were distant and confined to the limited partners of the new entity. *Id.*, at para. 42.

14. In its exceptions, Life Style contends that the ALJ erred in failing to award it at least a slight preference over DBTA under the diversification criterion based on the media interests of one of DBTA's limited

[20] In the *I.D.*, Crants is listed as a 38.5% shareholder; however, on July 5, 1983, Crants sold Jones some of his stock, and each now owns 21.75% of Family. *See* DBTA Petition for Leave to Amend filed August 11, 1983. On August 3, 1983, the Mass Media Bureau, under delegated authority, approved a transfer of control of the licensee of the Springfield, Missouri facility from Crants to Jones. Crants, in turn, became the limited partner. Crants also disposed of his interests in the Knoxville, Tennessee permittee on April 8, 1983. *See* Petition for Leave to Amend, filed July 26, 1983.

partners, Crants.[21] It argues that the ALJ's reliance on *Cleveland Television Corp., supra,* is misplaced. It further contends error in the failure to award it a moderate diversification preference over DBC, and points out that television station WAIM, Anderson, South Carolina, was recently assigned to Mark III Broadcasting, in which DBC's Kupris is an 83.16% stockholder. Life Style observes that as soon as the assignment is executed, Kupris will control two television stations, one in Florida and one in a nearby state. Lastly, DBC asserts that all of the applicants are equal under the diversification criterion. It challenges the ALJ's finding that its television station in Panama City, Florida is more significant than the interests of Life Style and DBTA, arguing that its television station is located approximately 300 miles away. It also claims that Daniels' role as editor of *Christ For the World Family Magazine* should not have been ignored in evaluating Life Style's comparative position and that the television media interests of DBTA's Crants are far more significant.

15. We conclude that Life Style is entitled to a slight-to-moderate preference over DBC and a moderate preference over DBTA. We have already agreed that the ALJ's reliance on *Cleveland Television Corp., supra,* to eliminate any adverse diversification impact that DBTA might otherwise receive from the interests of its current limited partner, *i.e.,* Family (and/or Crants), is misplaced. In *Cleveland,* the applicant's organization structure was formed prior to the comparative cut-off date. In contrast, the restructuring of DBTA occurred after the "upgrading" cut-off date. It was patently unfair to both Life Style and DBC to permit DBTA to improve its comparative position post-hearing merely by merging, re-shuffling its constituent principals, and designating those with media interests as limited partners. No such "upgrading," as we have said, will be recognized.[22]

16. In any event, our current diversity evaluation is not confined to the media interests listed in the *I.D.;* both DBTA and DBC have acquired subsequent interests that must be considered. (*See Greater Wichita Telecasting, Inc., infra* note 39 and our later discussion of "changed circumstances"). Specifically, Crants, a DBTA principal, has acquired a 40% interest in station WMPV-TV, Mobile, Alabama. Jones, another DBTA principal, has acquired a 50% interest in station WJPR-TV, Lynchburg, Virginia. And, the spouse of Susan S. Root (a 10% stockholder

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[21] Life Style claims that the ALJ completely discounted the media interests of Family from his diversification analysis. However, as a minor matter, it appears that the ALJ gave some little weight to those other interests. *See I.D.,* para. 42.

[22] It is enough, we think, that the DBTA merger approval permitted the former DBTC principals the benefit of Family's qualifying transmitter site. *See supra* paras. 7-8. But, the bar against "upgrading" would be considered lost (or stolen) forever were we to recognize DBTA's creative attempt to exploit *Cleveland Television* on a post-hearing basis.

in DBTC, the general partner component of DBTA) has acquired control of stations WNDB(AM) and WWLV(FM), Daytona Beach, Florida, WVFM(FM), Lakeland, Florida, and KMVT-TV, Twin Falls, Montana. The media interests of Mr. Root are attributable to the DBTA principal for diversification purposes because of the Commission's policy which presumes common control of media interests by husband and wife. *See Absolutely Great Radio, Inc.*, 55 RR 2d 15, 18-19 (1983); *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 425-427 (1981).[23] Finally, Kupris (the 80% stockholder of DBC) has now acquired station WAIM-TV, Anderson, South Carolina (along with a translator station in Greenville, South Carolina).

17. Weighing the media interests as they appear as of this writing, we believe that Life Style is entitled to a slight-to-moderate preference over DBC. The sole interest currently attributable to Life Style, as agreed to by DBC, is Daniels' role as editor of *Christ For the World Family Magazine*.[24] That magazine is distributed in Life Style's service area and has a circulation of approximately 34,000; it must be considered for media diversification purposes. *Cf. Merrimack Valley Broadcasting, Inc., supra*, 92 FCC 2d at 517 (monthly magazine and monthly newspaper cognizable under diversification). Daniels' interest in Life Style, however, is only 18%, and the comparative weight of this minor media interest is thus very slight. *See id.* Quite obviously, we find it of more significance that DBC's 80% stockholder (Kupris) already owns two other television stations — one in Florida, and another in a nearby state. Media interests in the same type of service as the subject applications are more significant *per se* than other media holdings. *See, e.g., Cleveland Television Corp., supra*, 91 FCC 2d at 1138-1139. In addition, Kupris owns a far greater interest in DBC than Daniels owns in Life Style, *i.e.*, 80% vs. 18%. Nevertheless, as a technical adjustment, we have reduced marginally the preference awarded Life Style *vis-a-vis* DBC because neither station owned by DBC's Kupris is located nearer than 300 miles from the proposed station.

18. We also find that Life Style and DBC are both entitled to a preference over DBTA: Life Style shall receive a moderate preference and

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[23] As indicated in para. 11, *supra*, Mrs. Root severed her relationship with DBTA on March 15, 1984. Her post-cut-off date withdrawal, however, does not eliminate the comparative demerit attributable to DBTA based on Mrs. Root's pre-"upgrading" ownership interest in the applicant. *See, e.g., Nuance Corp., supra*, 85 FCC 2d at 118 (departure of principal cannot enhance applicant's comparative position).

[24] Clark's role as a receiver of station WDAT, Ormond Beach, Florida will not be attributed to Life Style for diversification purposes because he indicated at the time he was appointed receiver that he would divest himself of the interest if Life Style's application were granted. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 813-814 (Rev. Bd. 1982), *review denied* FCC 83-368, released September 15, 1983 (Comm'n).

DBC a slight-to-moderate one. Under the diversification criterion, media holdings in the principal community proposed to be served are generally of most significance, followed by interests in the remainder of the proposed service area, and then by interests elsewhere. *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, 394-395 (1965). Thus, the media interests of most significance to the Commission are Station WNDB and WWLV(FM), Daytona Beach, Florida, attribute to Mrs. Root (the 10% general partner of DBTA). It is well-established that competing applicants are entitled to a substantial comparative preference over competing applicants with media interests in the community of license. *See, e.g., Golden State Broadcasting Corp.,* 54 RR 2d 348 (Rev. Bd. 1983). However, a substantial preference over DBTA is not warranted because both Life Style and DBC own other media; and Mrs. Root is considered only a 10% general partner of DBTA.[25] Yet, the weight that must be attached to Daytona stations WNDB and WWLV(FM) is comparatively greater than that attending Life Style's and DBC's interests. *Policy Statement, supra.* When these Daytona broadcast interests are coupled with DBTA's other attributable media interests (which include a third broadcast facility in Florida), we find that both Life Style and DBC must be ranked over DBTA under the diversity criterion.

19. *Comparative Coverage.* Upon review of the briefs on the exceptions to the *I.D.,* and during the course of oral argument thereon before the Board, it became apparent that the issue of the comparative coverage proposals of the respective applicants could become decisional in this case. *See, e.g., FBC, Inc.,* FCC 83R-104 (Rev. Bd. 1983) (*application for review pending*). Noting that the areas and populations to be covered by the respective applicants were based on the exceedingly dated U.S. Census figures (1970) contained in the applicants' original Joint Engineering Exhibit Nos. 1, 1A, and 2, the Board inquired as to whether reasoned decision-making required that it take into consideration any changed circumstances with respect thereto occurring since the 1970 Census.[26] We also asked the subsidiary question of whether outstanding construction permits or new stations should be taken into consideration in evaluating so-called "underserved" areas.[27] The views of the parties varied as to the Board's obligation under these circumstances; and because the parties

[25] *But see Terre Haute Broadcasting Corp.,* 25 FCC 2d 348 (Rev. Bd. 1970), where an applicant with no media interests received a substantial preference over one whose 16% stockholder owned one of seven rural stations in the proposed community of license. There, however, the 16% stockholder was the largest shareholder, proposed general manager, and chief executive officer of the station.

[26] *See* Tr. of Oral Arg., September 15, 1983, *passim.*

[27] "None of the applicants proposes to serve 'white' (no existing service) areas. All, however, would provide service to presently underserved areas ranging from 'gray' (one existing service) to four existing services." *I.D.,* at para. 33.

had not fully or directly briefed this question,[28] the Board called for (a) supplemental briefs on the rule of law controlling the consideration (*vel non*) of changed circumstances and (b) a supplemental joint study of updated area and population coverage by the respective applicants based on more recent census figures in the event that the Board decided that certain changed circumstances should be considered in this decision.

20. To their everlasting credit, the contending parties expeditiously produced not one, but four joint supplementary engineering exhibits responsive to our request with a minimum of clamor or fractiousness. While various parties continue to disagree on which, if any, of the supplemental exhibits should be considered in resolving the comparative coverage issue, there is agreement on the accuracy of the four joint studies generally described in footnote[29] below.

21. In addressing first the legal question of whether we should (or indeed, must) consider updated population information which could be considered decisionally significant, the Board is confronted with two seemingly oppositive principles — each having equitable appeal and the force of legal precedent. *Principle A* (we shall call it) is the doctrine of "administrative finality" which supports the freezing of an administrative record at a predetermined point in time. *See, e.g., Valley Telecasting Co., Inc.* v. *FCC,* 336 F.2d 914, 917 (D.C. Cir. 1974); *The Western Connecticut Broadcasting Company,* 69 FCC 2d 1890, 1897 (1978). *See generally Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 294-297 (1974). Conversely, *Principle B* is the rule of "changed circumstances" which militates toward the recognition of potentially decisional facts available to the agency after the close of the evidentiary record, but while the case remains within the jurisdiction of the agency and before judicial disposition. In this vein, *see, e.g., Crosthwait* v. *FCC,* 584 F.2d 550 (D.C. Cir. 1978); *W.S. Butterfield Theatres* v.

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[28] *But cf.* Life Style Reply Exceptions at 21 *et seq.*

[29] "Supplemental Joint Exhibit 1, which consists of a map and data reflecting the applicants' respective coverage proposals and the coverage of all commercial television stations (including granted construction permits for new stations and modifications of existing stations) in existence as of December 9, 1983;

Supplemental Joint Exhibit 2, which reflects the same coverage as in Supplemental Joint Exhibit 1 (above), and, in addition thereto, the coverage of non-commercial television station WUFT, Gainesville, Florida;

Supplemental Joint Exhibit 3, which reflects the same classes of stations as in Supplemental Joint Exhibit 1 (above), but as of the date the record in this case was closed by the Presiding Judge on coverage matters (*i.e.,* December 7, 1981; see Tr. 219); and

Supplemental Joint Exhibit 4, which reflects the existence of cable television systems in areas served by some, but not all, of the applicants as of December 9, 1983." *Cohn & Marks Letter* of January 26, 1984.

FCC, 231 F.2d 552 (D.C. Cir. 1956); *Enterprise Co.* v. *FCC*, 231 F.2d 708 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 920 (1956). *See also* 47 U.S.C. §1.65[30]; 47 U.S.C. §1.106.[31] It is fair to say that to the extent that there is tension between this pair of guiding principles, it has not been definitively resolved, at least insofar as applicability to the precise situation at bar.

22. As the Media Bureau notes,[32] the gravamen of *Principle A* ("administrative finality") was commended by the court in *Valley Telecasting, supra:*

> Orderliness, expedition and finality in the adjudicating process are appropriate weights in the scale as reflecting a public policy which has authentic claims of its own.

336 F.2d at 917. And, invoking the rationale of *Bowman Transportation, supra,*[33] Life Style — like the Media Bureau — argues against reopening the record for the inclusion of updated census figures or newly-authorized service in the relevant geographical area; it contends[34]:

> Population is never static. New construction permits affecting applicants' proposals to serve underserved areas/populations are routinely granted from time to time. As a result, by the time the Board issues a decision in this proceeding, the "updated'

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[30] Section 1.65 of the Commission's Rules requires an applicant to continuously advise it of "a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving a pending application. . . ." *See RKO General, Inc.* v. *FCC*, 670 F.2d 215, 229 & n.39 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1974, 2931 (1983).

[31] Section 1.106 (b)(2) of the Commission's Rules permits petitions for reconsideration of a denial of an application for review if there are changed factual circumstances. *See also* 47 U.S.C. §1.115(g).

[32] Med. Bur. Supp. Br. at 3.

[33] Therein, the Supreme Court affirmed the ICC's failure to reopen an adjudicatory record for more contemporary data, stating:

> [T]here would [be] little assurance that at the conclusion of such a re-opening, and the time required to digest the new material, the record would not again have become 'stale.' Accordingly, we conclude that there is sound basis for adhering to our practice of declining to require reopening of the record, except in the most extraordinary circumstances.

Life Style Supp. Br. at 7 (*quoting* 419 U.S. at 296).

[34] Life Style Supp. Br. at 5-6. It goes on to submit (*id.*, at 8-9):

> The Board will issue a decision in this case and then, perhaps when it is before the Commission (or perhaps the Court of Appeals), a dissatisfied party will petition to re-open the record on the grounds that the use of data as of December 1983 was arbitrary in view of changes in circumstances. If the Board permits re-opening of the record to allow for up-dating two years after hearing (*i.e.*, as of December 1983), on what grounds could the Commission later refuse to re-open the record four years after the hearing (*i.e.*, December 1985)? In what sense is December 1983 a more sensible date to use for establishing Life Style's coverage superiority than December 1985? The likelihood of repeated efforts to re-determine facts that are basic to a final decision permitting new service to the public provides a compelling reason not to permit *any* re-opening of the record on the question of coverage.

> coverage information contained in the supplemental joint exhibits might itself have become stale. The record will necessarily require further updating. Constant updating, however, will delay — perhaps *ad infinitim* the institution of the new service to public. [Footnote omitted.]

Nonetheless, both the Media Bureau and Life Style admit of a "fall-back" position: should the Board decide to consider *any* updated area and population coverage data, such consideration should be limited to that contained in Supplemental Joint Exhibit 3, which data reflects the facts as of December 7, 1981, the date on which the hearing record was formally closed for the submission of evidence. As described in note 29, *supra*, Supplemental Joint Exhibit 3 differs from the data supplied in the original joint exhibits in that (a) it is based on 1980 U.S. Census figures, not 1970 figures; and (b) it takes into consideration the construction permit for Channel 51, Ocala, Florida (granted on October 26, 1981).[35]

23. In favor of applying *Principle B* ("changed circumstances") is DBTA, which opposes a decision based on "population data that is now almost fourteen years old,"[36] and asserts[37]:

> In the instant case no grant has been made; no applicant is seeking to upgrade its comparative position by amendment and the reasons are obvious as to why *current information* on population and coverage should be utilized by the Review Board.
>
> * * * * *
>
> Additionally, as Commission record will show, new television stations in Florida are being constructed and operated at an extremely rapid rate. There is no valid reason for the Commission to keep its 'head in the sand' and ignore not only population growth but the rapid expansion of additional stations serving the area in question.

It cites *W.S. Butterfield Theatres* and *Enterprise Co., supra*, and states[38]:

> It should be noted that these decisions permitted the Commission to reopen the record to receive current information *after the grant of a construction permit to one of the parties.* The current situation is even more amenable to the acceptance of

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[35] *See* Med. Bur. Reply Br. at 1-2; Life Style Supplemental Br. at 9-10. The Media Bureau acknowledges that granted construction permits are relevant to comparative coverage issues. Med. Bur. Supp. Br. at 2.

[36] DBTA Reply Br. at 3-4.

[37] *Id.*, at 4 (emphasis in original).

[38] *Id.*, at 2 (emphasis in original). In both cases, the court remanded comparative licensing proceedings to this agency for consideration of circumstances occurring even *after* a final decision by the full Commission. In *Enterprise Co.*, two applicants entered a tentative merger decision which, if later effectuated, would have altered the Commission's prior diversification analysis. In *W.S. Butterfield*, the winning applicant indicated a change in its programming and facilities proposals after a construction permit grant to it. The court held in both cases that changes affecting an applicant's comparative position while the case remained within FCC jurisdiction must be considered. It is noted, however, that both cases involved voluntary changes by the applicants relevant to their prior comparative positions, not factual changes in ambient circumstances.

up-to-date information than was the case in *W.S. Butterfield* and *Enterprise Co., supra.*

24. We have considered the foregoing contentions, and we appreciate the supplemental briefing by the parties. Just as there is underlying virtue in both *Principle A* and *Principle B,* there is reflected merit in the arguments of the parties, and we admit that the line differentiating the applicability of these two principles is not always "bright." After due contemplation, however, we have determined to rely on the data contained in Supplemental Joint Exhibit 3, which determination we believe does equivalent justice (or equivalent violence) to both salutary principles. It will be recalled that Supplemental Joint Exhibit 3 reflects the *actual* findings of the most recent official decennary Census prior to the date for the official close of the evidentiary record, thus not disturbing the substantive "finality" of that procedural event. As the same time, use of that exhibit permits this decision to be based upon the significantly "changed circumstances" of the pertinent population in the decade between the 1970 and 1980 U.S. Census findings.[39] We need not pontificate on whether the parties were *compelled* by the undertow of §1.65 of the Rules[40] to yield up the 1980 U.S. Census data in advance of our own request to observe that, had the 1980 data been submitted before the December 1981 close of hearing evidence, such data certainly would have governed the decision. Moreover, even beyond our so-called *Principles A & B,* above, one *overarching* principle of law about which there can be no dispute is that, in making a determination in a comparative licensing case, an "agency must engage in reasoned decision-making, articulating with clarity the reasons for its decisions and the significance of the facts particularly relied on."[41] To be forthcoming, we rather doubt that we could today justify "with clarity" any decisional reliance on 1970 U.S. Census data or explain the "significance" of such historical information in an April 1984 comparative decision. Further, we fail to see how reliance on

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[39] We do not believe, however, that the reliance on Supplemental Joint Exhibit 3 results in any impermissible comparative "upgrading." Comparative "upgrading" generally denotes a volitional change by a party to enhance its original application proposals after the deadline for such application changes is past. *See, e.g., Birmingham Family Television, Inc.,* 91 FCC 2d 348 (Rev. Bd. 1982) (substitute principal not considered for comparative purposes). Recognition of "changed circumstances" occurring outside of the subject proceeding, but central to a decisional issue, is quite routine. *See, e.g., Greater Wichita Telecasting, Inc.,* FCC 84-72, released March 15, 1984, *modifying* 90 FCC 2d 1046 (Rev. Bd. 1982) (acquisition of a new television station interest by a competing applicant *after* Board decision recognized for decisional comparative purposes (*see* FCC 84-72 at n.10)). *See also supra,* para. 16 (post-*I.D.* media acquisitions of instant applicants considered for comparative purposes).

[40] *See supra* note 30.

[41] *Central Florida Enterprises, Inc.* v. *FCC,* 598 F.2d 37, 49 (D.C. Cir. 1978), *cert. dismissed,* 441 U.S. 957 (1979).

Joint Supplemental Exhibit 3 would have much detrimental impact on the general doctrine of "administrative finality": although we must technically "reopen" the record for the inclusion of this later exhibit, no further delay is occasioned because (a) both the U.S. Census data as well as the number of other broadcast stations licensed to the relevant geographic area are contained in ordinary government records, of which official notice might be taken (*see generally* 5 U.S.C. §556(e)); and (b) Exhibit 3 is "joint," thus a matter of stipulation in any event. We therefore turn our comparative coverage determination on the data now submitted as Supplemental Joint Exhibit 3.[42]

25. Under Supplemental Joint Exhibit 3, the area and population coverage comparisons are as follows:

Life Style vs. DBC

Other Services	*Life Style*		*Daytona Broadcasting*		*Life Style Difference*	
	Area Sq. Mi.	*Population*	*Area* Sq. Mi.	*Population*	*Area* Sq. Mi.	*Population*
2	140	37,335	–	–	140	37,335
3	963	58,075	336	10,057	627	48,018
4	1632	272,571	1,305	256,979	327	15,592
5 or More	3790	644,545	1,387	111,577	2,403	532,968
Total	6525	1,012,526	3,028	378,613	3,497	633,913

[42] Having briefly explained why we believe it is appropriate to use Supplemental Joint Exhibit 3 as our touchstone on the comparative coverage issue, we should briefly indicate the reasons for not relying upon the remaining three joint supplemental engineering submissions. Thus, while Supplemental Joint Exhibit 1 contains the most recent population data (*i.e.*, as of December 31, 1983), we believe that doctrine of "finality" and the logic of *Bowman Transportation, supra*, do have considerable energy, and we are loathe to establish a precedent that implies that a Board decision shall be made only upon the most recent annual updates of census data. By that standard, there would be no "administrative finality" until — conceptually — a terminal denial of Commission reconsideration, and *any* FCC "decision" would be in recurring evolution prior thereto. *See Bowman Transportation, supra*, 419 U.S. at 294-295. For reasons more fully addressed in *FBC, Inc., supra*, we find that Supplemental Joint Exhibit 2 is not especially useful. *See* ____ RR 2d at ____ (non-commercial stations regarded somewhat differently in considering service alternatives). Finally, for reasons analogous to those set out in our recent decision in *Elba Development Corp.*, 55 RR 2d 647, 652-655 (Rev. Bd. 1984) (CATV not relevant to "white" or "gray" *broadcast* service areas), we likewise find Supplemental Joint Exhibit 4 to be not relevant. *See also* Med. Bur. Reply at 3.

Life Style vs. DBC

Other Services	*Life Style*		*DBTA*		*Life Style Difference*	
	Area Sq. Mi.	*Population*	*Area* Sq. Mi.	*Population*	*Area* Sq. Mi.	*Population*
2	140	37,335	–	–	140	37,335
3	963	58,075	268	8,654	695	49,421
4	1,632	272,571	967	249,677	665	22,894
5 or More	3,790	644,545	507	48,939	3,283	595,606
Total	6,525	1,012,526	1,742	307,270	4,783	705,256

26. At *I.D.*, para. 33, the ALJ compared the applicants' coverage proposals based on the 1970 Census figures:

Served by	*Not Served by*	*One Existing Service* *Area (sq. mi.)*	*Pop.*	*Two Existing Services* *Area (sq. mi.)*	*Pop.*
Life Style	DBC	133	19,504	602	31,853
Life Style	DBTA	133	19,504	602	31,853

Served by	*Not Served by*	*Three Existing Service* *Area (sq. mi.)*	*Pop.*	*Four Existing Services* *Area (sq. mi.)*	*Pop.*
DBC	DBTA	203	2,639	287	4,675
Life Style	DBC	330	7,338	642	37,045
Life Style	DBTA	533	9,923	929	41,720

Based on the data immediately above, the ALJ awarded Life Style a "slight" coverage preference. *I.D.*, para. 49. In their original exceptions, Life Style and the Mass Media Bureau argued that (even under the 1970 figures), Life Style's proposal to provide a second service to more than 19,000 persons and a third to more than 31,000 warranted more than a slight preference.

27. We believe that Life Style is entitled to a slight-to-moderate preference for its comparative coverage advantage. Initially, both the Commission and the Board have awarded at least slight preferences to applicants with substantial coverage advantages over competing applicants, even when the entire service areas were well served (five-or-more services) by existing stations. *See, e.g. Simon Geller*, 90 FCC 2d 250, 268-269, 276 (1982); *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 518 (Rev. Bd. 1982); *Wolverine Radio Co., Inc.*, 49 FCC 2d 1043, 1051 (ALJ), *aff'd*, 49 FCC 2d 1038 (Rev. Bd. 1974). Ergo, even if there were no "underserved" areas involved here, Life Style would be entitled to at least

a slight preference for its overall coverage because it will provide new service to approximately 2.6 times as many viewers as DBC (1,012,526 vs. 378,613) and nearly 3.3 times as many as DBTA (1,012,526 vs. 307,270). Second, we have held also that a preference will be awarded to applicants for providing new third and fourth services to substantial populations. *See Radio Jonesboro, Inc.*, FCC 84R-20, released March 21, 1984; *CJL Broadcasting, Inc.*, 88 FCC 2d 750, 757-758 (Rev. Bd. 1981), *modified on other grounds*, FCC 83-490, released October 21, 1983 (Comm'n). Here, Life Style would provide 85,353 more viewers with third and fourth services than would DBC, and with 86,756 more than would DBTA. It is our judgement that, when the total and "underserved" coverage superiorities are taken together, a coverage preference which is more than "slight" is warranted.[43] We will not award Life Style with what we ordinarily term a "moderate" preference for its coverage proposal, because such awards generally involve proposals to provide either a first or second new service, neither of which is currently involved here. *See, e.g., Golden State Broadcasting Corp.*, 54 RR 2d 348 (Rev. Bd. 1983); *Communications Properties, Inc., supra. Minneapolis Star and Tribune Co.*, 88 FCC 2d 1604 (Rev. Bd. 1982); *Town and Country Radio, Inc.*, 70 FCC 2d 572 (Rev. Bd. 1978). In this regard, we have also considered Life Style's contention that *Ultravision Broadcasting Co.*, 11 FCC 2d 394 (Rev. Bd. 1968), holds that Life Style's total coverage superiority *per se* entitles it to a stronger preference. But, as pointed out by Life Style's opponents, *Ultravision* has been modified by more recent precedent which would suggest that total coverage advantages, *simpliciter*, will support only a "slight" preference. *See Simon Geller, supra*, 90 FCC 2d at 269, 276. DBC, which will provide a fourth service to 1403 more people than DBTA, a fifth service to 7302 more than DBTA, and a total of 71,343 more than DBTA, will, in turn, be given a slight comparative preference over DBTA. *See CJL Broadcasting, Inc., supra*, 88 FCC 2d at 757-758.

28. *Alleged Misrepresentation and Lack of Candor.* On September 30, 1982, more than five months after the hearing record had been closed, DBTA filed a motion to enlarge issues against Life Style predicated on an interrogatory response and hearing testimony by Richard Y. Clark (Life Style's 7.2% stockholder and proposed general manager) concerning Commission forfeitures imposed against Walter-Weeks Broadcasting, Inc.

[43] While it may be bootstrapping, Life Style would have been entitled to a preference of roughly the same magnitude had we utilized the 1970 figures. Although Life Style's overall coverage would be only 637,551 people, the smaller coverage would be more than offset by the fact that it would have provided a *second* service to 19,504 *at that time. I.D.*, paras. 32-33. *See generally Communications Properties, Inc.*, 92 FCC 2d 45, 49 (Rev. Bd. 1982) ("moderate" preference given for second service to 4,456 population).

Clark was the latter's executive vice president from 1969 until 1980. Specifically, DBTA alleged that Clark had answered an interrogatory by indicating that Walter-Weeks had received a forfeiture penalty for lack of diligence in its billing procedures, and that such was the only fine imposed on Walter-Weeks while Clark was involved. DBTA urged that this was untrue because Walter-Weeks was also, during Clark's tenure, the recipient of an FCC forfeiture for failing to charge a political candidate the lowest unit price in the period before an election. DBTA further alleged that, at hearing, Clark testified that the Commission had not singled out any individual as being responsible for the improper political billing. DBTA claimed that such testimony was also untrue because the Commission's forfeiture letter referred directly to Clark. DBTA did not ask for further hearing on these allegations; it requested instead an opportunity to submit supplemental proposed findings. The ALJ denied the motion by *Memorandum Opinion and Order,* FCC 82M-3520, released November 8, 1982; and in his findings, the ALJ minimized the importance of these matters. *See I.D.,* para. 16. Therein, the ALJ stated that the billing problem arose because the stations invoiced clients directly from "start orders" rather than program logs, and thus some were charged for advertisements ordered but not actually aired. *Id.* But, he noted that the number of advertisements not actually run was "quite small," *id.,* that this was the only occasion when the Commission fined any of the stations in the Walter-Weeks group, and that Clark had "no personal knowledge of the mistaken billings" and "was several stages removed from the actual billing process." *Id.* The ALJ assessed Life Style no comparative demerit, and DBTA takes issue with the *I.D.'s* findings and the ALJ's denial of its motion to enlarge issues. It still seeks to submit supplemental findings.

29. We conclude that the ALJ properly denied the motion to enlarge issues, and also deny DBTA's request to submit additional findings on these matters. In opposition to the DBTA motion to enlarge, Life Style submitted the affidavit of Clark which averred that he had no personal recollection of the forfeiture matter. He further averred that he took no documents or records concerning the operations of Walter-Weeks when he left Walter-Weeks in 1980, and thus had no documents or records within his possession to rely on when answering the interrogatory. The affidavit indicated that Clark relied exclusively on his general powers of recollection. Because the forfeiture occurred more than six years before Clark answered the subject interrogatory, we cannot say that DBTA's allegation that Clark intentionally misrepresented warranted the addition of an issue. Whether Clark should have remembered or not is not relevant: the operative question is whether DBTA sufficiently demonstrated that Clark misrepresented or lacked candor. Once Clark denied recollection of the

six-year old incident at the precise time he answered the interrogatories, little mileage could be gained by trying the issue of Clark's powers of recall. Without more, denial of the requested issue was appropriate and we affirm the ALJ on the relevant points, particularly in light of DBTA's lethargy. 47 CFR §1.229(c).

Petition to Enlarge Issues

30. On January 16, 1984, Life Style filed a petition to enlarge issues against DBTA seeking issues concerning alleged reporting failures and violations of the "one-to-a-market" rule, the regional concentration of control rule, and the "cross-interest" policy. The requested issues are based on DBTA's failure to report media acquisitions on five separate occasions, including acquisitions attributable to Susan S. Root that may implicate the "one-to-a-market" and regional concentration of control rules as well as the "cross-interest" policy. We will not add the requested issues. Mrs. Root's *actual* withdrawal from DBTA on March 15, 1984 (*see supra* para. 11) moots all of the issues except for DBTA's alleged reporting failures.[44] And, further evidentiary inquiry on this matter would serve no useful purpose in light of our ultimate disposition.

Comparative Summation

31. All decisionally significant exceptions have been considered. Life Style has been awarded moderate and slight-to-moderate preferences over one rival, DBTA, and two slight-to-moderate preferences over DBC, under the diversification and coverage criteria, respectively. Life Style has also received a very slight preference over DBC under the ownership integration criterion. DBTA, on the other hand, has received only slight preferences over both Life Style and DBC under the integration criterion, while DBC has received a slight-to-moderate comparative preference over DBTA on the diversification criterion. No other preferences or demerits have been awarded or or assessed. Comparing the individual preferences concurrently, and according greater weight to the primary objective of media diversification and the "best practicable service" factor of ownership integration (*see Policy Statement on Comparative Broadcast Hearings, supra* 1 FCC 2d at 394), the balance must tip in Life Style's favor.[45] Consequently, we reverse the ALJ's ultimate conclusion and find

[44] While Mrs. Root's departure eliminates the basic diversification issues raised by Life Style under the Commission's multiple ownership restrictions, *see* Section 73.636(a) (1) and (a) (2) of the Rules, 47 CFR §73.636 (a) (1) and (a) (2), it does not, of course, moot comparative consideration of the prior ownership interests for comparative diversification purposes. *See supra* paras. 6, 8, 15-16.

[45] The *Policy Statement* divides the comparative criteria into two basic categories: diversification of control of the mass media (1 FCC 2d at 394) and "best practicable service" (*Id.*). Ownership integration and comparative coverage are but two elements of the latter category. While ownership integration is "of substantial importance" (*Id.*, at

that grant of Life Style's superior application will best serve the public interest, convenience, and necessity.

32. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed July 26, August 11, and September 15, 1983, and January 10, February 13, and March 21, 1984, by Daytona Beach Television Associates, Ltd., ARE GRANTED, and the amendments ARE ACCEPTED; that the petitions for leave to amend filed June 13, 1983 by Life Style Broadcasting, Inc. and July 27 and December 1, 1983 by Daytona Broadcasting Company, Inc. ARE GRANTED and the amendments ARE ACCEPTED; and

33. IT IS FURTHER ORDERED, That the motion for leave to file supplement and the request for official notice filed July 8 and 15, 1983 by Daytona Beach Television Associates, Ltd. ARE DISMISSED as moot; that the request for official notice filed May 20, 1983 by Life Style Broadcasting, Inc. IS GRANTED; that the motion to strike filed June 21, 1983, by Daytona Beach Television Associates, Ltd. IS DENIED; that the motion to strike filed July 11, 1983, by Daytona Broadcasting Company, Inc. IS GRANTED; that the petition to enlarge issues filed January 16, 1984, by Life Style Broadcasting, Inc. IS DENIED; that the Request for Opportunity to File Supplement Exceptions and Argument to Initial Decision, filed March 23, 1984, by Life Style Broadcasting, Inc., IS DENIED; and that the supplement filed April 9, 1984, IS DISMISSED; and

34. IT IS FURTHER ORDERED, That the application of Life Style Broadcasting, Inc. (File No. BPCT-800811KF) for a construction permit to establish a new television broadcast station at Daytona Beach, Florida IS GRANTED; and the applications of Daytona Broadcasting Company, Inc. (File No. BPCT-800811KE) and Daytona Beach Television Associates, Ltd. (File No. BPCT-800811KH) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL *Member, Review Board*

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395), the Board long ago recognized the solidity of the comparative coverage element.

> [U]nlike the other criteria for evaluating comparative proposals, engineering coverage is the least likely to be changed. Local owners may move away or sell out to outsiders. Integrated owners may decide to entrust daily management to salaried staff. But significant technical changes cannot be made except on application to, and approval of, the Commission.

Chapman Radio and Television Co., 19 FCC 2d 185, 236 n.38 (ALJ 1968), *aff'd*, 19 FCC 2d 157 (Rev. Bd. 1969). *See also FBC, Inc., supra*; *cf. Ram Enterprises*, 57 FCC 2d 844 (Rev. Bd. 1976).

FCC 83D-27

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
DAYTONA BROADCASTING COMPANY, INC. Daytona Beach, Florida	BC Docket No. 81-262 File No. BPCT-800811KE
LIFE STYLE BROADCASTING, INC. Daytona Beach, Florida	BC Docket No. 81-263 File No. BPCT-800811KF
DAYTONA BEACH TELEVISION ASSOCIATES, LTD. Daytona Beach, Florida	BC Docket No. 81-265 File No. BPCT-800811KH
For a Television Construction Permit	

Appearances

Martin E. Firestone and *Ford Rowan* on behalf of Comark Television, Inc.; *Michael J. Wilhelm* on behalf of Metrovision, Inc.; *David Tillotson* and *Pamela S. Baron* on behalf of WTWV, Inc.; *James L. Oyster* and *Clarence V. McKee* on behalf of Daytona Broadcasting Company, Inc.; *Lawrence N. Cohn* and *Mark L. Pelesh* on behalf of Life Style Broadcasting, Inc.; *Robert S. Stone, Jonathan D. Blake* and *Daniel A. Rowley* on behalf of Daytona Beach Family Television, Inc.; *Joseph M. Morrissey* on behalf of Daytona Beach Television Corporation; *Dennis J. Kelly* on behalf of Caloosa Television Corporation, party respondent; and *Brian P. Kilbane* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOHN M. FRYSIAK

Issued: April 18, 1983; Released: April 25, 1983

Preliminary Statement

1. By *Hearing Designation Order*, 46 Fed. Reg. 24296, published April 30, 1981, the Commission, by the Chief, Broadcast Bureau, acting pursuant to delegated authority, designated for hearing the mutually-exclusive applications of Comark Television, Inc. (Comark), Metrovision, Inc. (Metrovision), WTWV, Inc. (WTWV), Daytona Broadcasting Company, Inc. (DBC), Life Style Broadcasting, Inc. (Life Style), Daytona Beach Family Television, Inc. (Family) and Daytona Beach Television Corporation (DBTC) for a new commercial television station to operate on Channel 26 at Daytona Beach, Florida.[1] The following issues were specified by the *Designation Order:*

1. To determine with respect to Comark Television, Inc.:
   - (a) whether the proposal of the applicant is consistent with the minimum mileage separation requirements of Section 73.610 of the Commission's Rules, and, if not, whether circumstances warrant a waiver of the Section;
   - (b) whether broadcast equipment is available to the applicant as proposed; and
   - (c) whether, in light of the evidence adduced pursuant to (a) and (b) above, the applicant is qualified.
2. To determine with respect to Metrovision, Inc.:
   - (a) whether the proposal of the applicant is consistent with the minimum mileage separation requirements of Section 73.610 of the Commission's Rules, and, if not, whether circumstances warrant a waiver of the Section;
   - (b) whether there is a reasonable possibility that the tower height and location proposed by the applicant would constitute a hazard to air navigation;
   - (c) whether the applicant has $1,249,750 available for construction and three month operating costs; and
   - (d) whether, in light of the evidence adduced pursuant to (a)-(c) above, the applicant is qualified to construct and operate as proposed.
3. To determine whether there is a reasonable possibility that the tower height and location proposed by WTWV, Inc. would constitute a hazard to air navigation and, if so, whether the applicant is qualified.
4. To determine with respect to Daytona Broadcasting Company, Inc.:
   - (a) the cost of leasing or purchasing the applicant's proposed transmitter site;
   - (b) in light of the evidence adduced pursuant to (a) above, Daytona Broadcasting's total cost of construction and operation;
   - (c) the availability of financial resources in addition to the $800,000 bank loan to meet the applicant's construction and operation costs;
   - (d) whether, in light of the evidence adduced pursuant to (a)-(c) above, the applicant is financially qualified to construct and operate as proposed; and

[1] Pursuant to Section 73.607(b) of the Commission's Rules, WTWV proposed New Smyrna Beach, Florida as its principal community of license.

(e) whether there is a reasonable possibility that the tower height and location proposed by the applicant would constitute a hazard to air navigation and, if so, whether the applicant is qualified.

5. To determine with respect to Life Style Broadcasting, Inc.:

(a) whether the applicant has complied with the provisions of Questions and Answers 9, 15 and 22 of the *Primer;*

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is qualified; and

(c) whether there is a reasonable possibility that the tower height and location proposed by Life Style would constitute a hazard to air navigation and, if so, whether the applicant is qualified.

6. To determine with respect to Daytona Beach Television Corporation:

(a) whether the proposal of the applicant is consistent with the minimum mileage separation requirements of Section 73.610 of the Commission's Rules, and, if not, whether circumstances warrant a waiver of that Section; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is qualified.

7. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would provide a fair, efficient and equitable distribution of television service.

8. In the event it is concluded from Issue 7 above that a choice between applications should not be based solely on considerations relating to Section 307(b), to determine which of the proposals would, on a comparative basis, best serve the public interest.

9. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. By *Memorandum Opinion and Order* FCC 81M-2709, released August 28, 1981, the issues in this proceeding were enlarged to include the following:

To determine whether Comark Television, Inc. has a reasonable assurance of the availability of funds represented by a letter dated November 15, 1979 to it from the Old Colony Bank, and in light thereof, whether Comark Television, Inc. is financially qualified.

3. By *Memorandum Opinion and Order* FCC 81M-2724, released September 1, 1981, the ascertainment issues specified against Life Style were deleted; and by *Memorandum Opinion and Order* FCC 81M-2747, released September 1, 1981, a motion for summary decision was granted and the financial issues specified against DBC were resolved in the applicant's favor.

4. By *Memorandum Opinion and Order* FCC 82M-0266, released January 26, 1982, the application of Metrovision was dismissed pursuant to a joint settlement agreement. The application of WTWV was also dismissed in accordance with the terms of another settlement agreement

after it was determined that the withdrawal of WTWV's application would not "unduly impede" the achievement of a fair, efficient and equitable distribution of service mandated by Section 307(b) of the Communications Act of 1934, as amended. *Memorandum Opinion and Order* FCC 82M-0386, released February 5, 1982. The application of Comark was dismissed pursuant to yet another settlement agreement. *Memorandum Opinion and Order* FCC 82M-0579, released February 23, 1982.

5. By *Memorandum Opinion and Order* FCC 82M-2201, released July 19, 1982, *affirmed,* FCC 82R-51, released August 18, 1982, *recon. dismissed,* FCC 82R-56, released September 20, 1982, the merger of DBTC and Family into a new entity, Daytona Beach Television Associates, Ltd. (DBTA), was approved; DBTC was allowed to amend its application to specify DBTA as the applicant and substitute Family's engineering proposal in place of the one proposed by DBTC; and the application of Family was dismissed.

6. Prehearing conferences were held July 24, 1981 and November 13, 1981. The hearing took place in Washington, D.C. on December 7, 1981, and a post-hearing conference was held March 1, 1982. The record was closed April 6, 1982 pursuant to *Order* FCC 82M-1129, released April 8, 1982. Proposed findings of fact and conclusions of law were filed by the parties on October 4, 1982, and reply findings were filed on October 18, 1982.

Findings of Fact

Air Traffic Hazard Issues

7. On September 29, 1981, the FAA issued a Determination of No Hazard To Air Navigation with respect to DBC's amended tower height. DBC Ex. 3, p. 2. On October 19, 1981, the FAA advised DBC that a petition for review of the determination had been filed. DBC Ex. 3, p. 1. By letter dated December 11, 1981, the FAA informed DBC that it had denied the petition for review and that the Determination of No Hazard To Air Navigation was final. DBC Ex. 5. On October 26, 1981, the FAA issued a Determination of No Hazard To Air Navigation with respect to Life Style's proposal. Life Style Ex. 8, p. 2. On November 25, 1981, the FAA advised Life Style that a petition for review of the determination had been filed. Life Style Ex. 11. By letter dated March 25, 1982, the FAA informed Life Style that it had denied the petition for review and that the Determination of No Hazard To Air Navigation was final. Life Style Ex. 13. The Experimental Aircraft Association, Chapter 635, and Family appealed the determination to the U.S. Court of Appeals for the District of Columbia Circuit (Case No. 82-1395). By *Order* dated August 2, 1982, the

appeal was dismissed by request of the petitioners.[2] On December 13, 1982, the FAA issued a no hazard determination for DBTA's modified engineering proposal contained in its November 24, 1982 amendment.[3]

Section 73.610 Issue

8. A short-spacing issue designated against DBTC was mooted by DBTA (the merged applicant) specifying the engineering proposal of Family as that of the limited partnership.

Comparative Issue

Daytona Broadcasting Company, Inc.

9. The ownership of DBC is as follows:

Name	*Office*	*Ownership*
Anthony C. Kupris	President, Treasurer & Director	80.0%
Mary R. Kupris as Custodian for Mark D. Kupris	Secretary & Director	4.7%
Mary R. Kupris as Custodian for Christopher J. Kupris	Secretary & Director	4.7%
Catherine F. Kupris	Assistant Secretary & Director	2.6%
Susan K. Murphy	Director	2.6%
John A. Kupris	Director	2.6%
Anthony C. Kupris, Jr.	–	2.6%

DBC Form 301, Section II, Table I. Official notice taken.

10. Anthony C. Kupris is president, a director and sole shareholder of Agronomics, Inc., which in turn owns all issued and outstanding stock of Octagon Broadcasting Company. Mr. Kupris is president, treasurer and a director of Octagon Broadcasting Company. Octagon Broadcasting Company is licensee of television station WMBB, Panama City, Florida, and permittee of a television translator in Tallahassee, Florida. DBC Ex. 1. Agronomics, Inc. is also a 6% limited partner in the permittee of a Little Rock, Arkansas UHF station. DBC Amendment filed October 4, 1982.

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[2] Official notice of this *Order* is taken pursuant to request filed August 6, 1982 by Life Style.

[3] Official notice of the no hazard determination is taken pursuant to request filed December 22, 1982 by DBTA.

11. Anthony C. Kupris will supervise the overall operation and management of the proposed station, including administration, sales and programming. He proposes to devote approximately 20 to 30 hours per week to those responsibilities. He does not plan to relocate his residence to Daytona Beach. Mr. Kupris has been president, a director and 100% shareholder of the parent company of the licensee of WMBB(TV), Panama City, Florida, since 1977. For the same period, he has been president, treasurer and a director of the licensee corporation. During that period, Mr. Kupris has devoted part of his time (approximately 20 hours per week) to overseeing the operation of the station, including administration, sales and programing. DBC Ex. 2.

Life Style Broadcasting, Inc.

12. The ownership of Life Style comprises two classes of stock – Class A Common (voting) and Class B Restricted Common (non-voting), subscribed to as shown below:

Name	*Office*	*Stock Ownership*		*% Voting*
		Non-Voting	*Voting*	*Ownership*
M. Lee Cook	President, Director	1,200	4,800	4.3
J. Kermit Coble	Secretary/Treasurer, Director	3,000	12,000	10.8
Bobby H. Welch	Vice President/ Religious Affairs, Director	600	2,400	2.1
Hal Marchman, Jr.	Vice President/ Social Services, Director	600	2,400	2.1
Dr. Richard V. Moore	Vice President/ Minority Affairs, Director	400	1,600	1.4
Sally I. Gillespie	Vice President/ Community Affairs, Director	600	2,400	2.1
Richard Y. Clark	Executive Vice President	2,000	8,000	7.2
Van W. Pierce	–	12,000	3,000	2.7
O. L. (Jack) White	Director	900	3,600	3.2

Name	*Office*	*Stock Ownership Non-Voting*	*Voting*	*% Voting Ownership*
James O. Taylor	-	1,200	4,800	4.3
Pope A. Duncan	Vice President/ Educational Affairs, Director	2,000	8,000	7.2
Anthony J. Barbera	-	1,200	4,800	4.3
Lewis Wadsworth	-	1,800	7,200	6.4
Peggy Wesley	Assistant Secretary	900	3,600	3.2
Dr. E. J. Daniels	Director	80,000	20,000	18.0
Dr. Oliver L. Walker	-	600	2,400	2.1
Henderson Belk	-	80,000	20,000	18.0

Life Style Ex. 1, pp. 1-3.

13. Class B Restricted Common Stock is entitled to all rights commensurate with corporate common stock, except that the Class B shareholders are not entitled to vote except with respect to a sale of all or substantially all of the assets of the corporation or with respect to the liquidation and dissolution of the corporation. The Articles of Incorporation further state that: "No dividend shall be paid on the Class A common stock unless a commensurate per share amount is likewise paid on the Class B Restricted Common Stock; it being intended that the shareholders of both classes shall share proportionately in a per share pro-rata basis and on dividend distributions." Tr. 167.

14. J. Kermit Coble owns one share of stock in Halifax Cable TV, Inc., operator of a cable television system in Daytona Beach, Florida. Life Style Ex. 1, p. 3. This interest is subject to an express divestiture condition in the *Designation Order.* Dr. E. J. Daniels is the owner and president of Daniels Publishing Co., Inc. located in Orlando, Florida, which specializes in the production of religiously-oriented books, magazines and pre-prints sold in department stores, etc. He is also editor of *Christ For the World Family Magazine* (Orlando, Florida; circulation 34,000) and owner of a 33% interest in the *Vero Beach Advertiser* (Vero Beach, Florida). Mr. Coble owns a 25% interest in the following advertising shoppers: *The South Brevard Shopper* (Melbourne, Florida); *The Central Brevard Shopper* (Cocoa, Florida); and *The North Brevard Shopper* (Titusville,

Florida) (combined circulations 126,000). Life Style Ex. 1, p. 3; Ex. 12.[4]

15. Richard Y. Clark is proposed to be integrated full time as general manager of the station. He resides approximately one mile from Daytona Beach. He has past broadcast experience in radio. He started as an announcer at KTEM(AM), Temple, Texas in 1954, and became program director of WMFJ(AM), Daytona Beach, Florida in 1957, later to become station manager of WMFJ AM/FM. In 1969 he became executive vice president, a director and 5% shareholder in Walter-Weeks Broadcasting, Inc., a chain of radio stations consisting of WMFJ AM/FM in Daytona Beach, WJNO AM/FM in West Palm Beach, Florida, WALT(AM) in Tampa, Florida, and later WOMA/WTNT(FM) in Tallahassee, Florida. He left his position in March 1980 when the company was liquidated. Life Style Ex. 2, pp. 1-2.

16. While Mr. Clark was executive vice president of Walter-Weeks, three of its stations were fined by the Commission for lack of due diligence in their billing procedures. The problem arose because the stations billed clients from start orders rather than from program logs. As a result, some clients were billed for advertisements that they had ordered but that were not actually broadcast. Tr. 171-73. The Walter-Weeks billing procedure was apparently fairly common in the industry. Tr. 176. The number of advertisements not actually run was quite small (Tr. 188), and the mistakes were minor enough to cause the Commission to grant regular license renewals to each of the stations without any comment or restriction. Life Style Ex. 10. This was the only occasion when the Commission fined any stations in the Walter-Weeks group. Tr. 192-93. Most importantly, Mr. Clark had no personal knowledge of the mistaken billings. Tr. 177, 181, 183, 184, 185. While he exercised general management supervision, Mr. Clark was several stages removed from the actual billing process. Tr. 174-76. Any errors that did come to his attention were corrected. Tr. 185-87.

17. Mr. Clark has lived in Daytona Beach since 1979 and in the Daytona Beach area (*i.e.*, within six miles of the city) since 1967. He currently operates a travel business in Daytona Beach. Life Style Ex. 2, p. 1. He has been active in civic affairs. For example, he has been president of the Daytona Beach Chamber of Commerce, Kiwanis Club and Advertising Federation. He has been a member of the boards of the local American Red Cross, American Cancer Society, United Way, Boy Scouts, Salvation Army, South Minster Presbyterian Church and Volusia Educators Association. He has also been General Campaign Chairman of the United Way, Vice Chairman of the Bethune-Cookman College Fundraising Campaign,

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[4] Official notice is taken of the distances between Daytona Beach and Orlando (50 miles), Vero Beach (120 miles), Melbourne (80 miles), Cocoa (60 miles) and Titusville (40 miles). Orlando is within Life Style's Grade B contour. Joint Ex. 1, Fig. 1-A.

Vice Chairman of the Father Lopez High School Fundraising Campaign, and a member of the Daytona Beach Civic League. Life Style Ex. 2, pp. 2-3.

18. Sally I. Gillespie proposes to be integrated part time (24 hours per week) in the development of public affairs and other informational programming. Life Style Ex. 3, p. 1. Her past broadcast experience is limited to service as a member of the Board of Directors of educational television station WMFE, Orlando, Florida, from 1959 to 1968 and the production of two program series in the early and mid-1960s. Life Style Ex. 3, pp. 2-3. She lives in New Smyrna Beach, which is approximately 25 miles from Daytona Beach. Life Style Ex. 3, p. 1. Ms. Gillespie has been involved in various civic activities, only two of which – her membership in the Daytona Beach Symphony Society and service as a trustee of the Daytona Beach Community College – have been in Daytona Beach. Life Style Ex. 3, p. 4.

19. Richard V. Moore, a Black American, proposes to be integrated part time (24 hours per week) as the station's vice president for minority affairs; as such, he will serve as liaison with the Black community. He is retired and lives in Dayton Beach, Florida. Prior to his retirement, Dr. Moore was a local college president. He has no past broadcast experience. He has been involved in civic activities, but the significance of his involvement (whether he actively participated or was simply associated with an organization) does not appear in the testimony. Life Style Ex. 4.

20. Hal Marchman, Jr. proposes to be integrated part time (24 hours per week) in coordination between the station and the social service agencies and organizations in the Daytona Beach area. Mr. Marchman is the Minister at the Central Baptist Church in Daytona Beach. He has no past broadcast experience. He has been president of the YMCA, president of the Hearing Society of Volusia County, chairman of the board of the Stewart Treatment Center and on the board of various other organizations. Life Style Ex. 5.

21. M. Lee Cook proposes to be integrated part time (24 hours per week) as director of public affairs. He resides in Daytona Beach. Prior to retirement, Mr. Cook was department store manager. He has no past broadcast experience. He has served as Chairman, Merchants' Division, Daytona Beach Chamber of Commerce; member, City Beach Advisory Board; Vice President, Daytona Beach Chamber of Commerce; City Commissioner, Daytona Beach; and on various boards of community organizations. Life Style Ex. 6.

22. Oliver L. Walker proposes to be integrated part time (24 hours per week) as religious coordinator. He lives in DeLand, Florida, which is approximately 20 miles from Daytona Beach. He has no past broadcast

experience. Now retired, Dr. Walker was a professor of religion. His civic activities are in DeLand, Florida. Life Style Ex. 7.

Daytona Beach Television Association, Ltd.

23. DBTA is a limited partnership formed under the laws of the State of Florida. DBTC, the General Partner, holds a 60% interest in the partnership; Family, the Limited Partner, holds a 40% interest. DBTC, as General Partner, has the exclusive right and full authority to manage, conduct, control and operate the partnership's business. Limited Partnership Agreement appended to Joint Petition For Approval of Merger Agreement, filed April 30, 1982.

24. Family was formerly an applicant in this proceeding. Pursuant to the DBTC-Family merger agreement, its application was dismissed and DBTC's application was amended to reflect the merger into a limited partnership. The merger-implementing amendment was accepted and the acceptance was affirmed by the Review Board. The Review Board denied reconsideration of its decision.

25. DBTC is a corporation organized under the laws of the State of Florida. It has 3,100 authorized shares – 100 Class A voting shares with a par value of $1.00 per share and 3,000 Class B non-voting shares with a par value of $2.00 per share. All the authorized shares have been subscribed to. DBTC Form 301, Section II, Par. 9 and Table I; DBTC Amendment filed June 11, 1982. The shareholders, officers and directors of DBTC are as follows:

Name	*Office*	*No of Shares*		*% Voting*
		Non-Voting	*Voting*	*Ownership*
Edgar M. Dunn, Jr.	President & Director	240	20	20
Donald B. Holton	Secretary/ Treasurer & Director	300	10	10
Samuel P. Bell	Vice President & Director	483	10	10
Robert L. Voges	Vice President & Director	300	10	10
Samuel G. Dunn	Vice President & Director	120	10	10
Susan S. Root	Vice President & Director	300	10	10
Merrel C. Lloyd	Vice President & Director	180	10	10

Name	*Office*	*No of Shares* *Non-Voting*	*Voting*	*% Voting Ownership*
Lonnie T. Brown	Vice President & Director	60	10	10
Margaret M. Dunn	Vice President & Director	87	10	10
Jay D. Bond, Jr.	Director	–	–	–
William Akers, Jr.	–	300	–	–
James T. Molloy	–	330	–	–
Anargyros Xepapas	–	300	–	–

DBTC Form 301, Section II, Table I; DBTC Amendment filed June 11, 1982.

26. None of the principals of DBTC, the general partner, has any ownership or other interest in any broadcast facility or other mass communications media. DBTC Response To Interrogatories, filed August 24, 1981.

27. Donald B. Holton, secretary-treasurer, director and a 10% (voting stock) shareholder, is a resident of Ormond Beach, Florida. He is proposed as a full-time business manager of the station. DBTC Form 301, Section IV-B, Par. 21; DBTC Amendment filed November 13, 1980; DBTC Ex. 1. He has participated in a number of local civic and community activities. DBTC Ex. 3.

28. Susan S. Root, vice president, director and a 10% (voting stock) shareholder, is a resident of Daytona Beach, Florida. If the DBTA application is successful, she would be integrated as a full-time community affairs director of the station. DBTC Form 301, Section IV-B, Par. 21; DBTC Amendment filed November 13, 1980; DBTC Ex. 1. She has participated in a number of local civic and community activities. DBTC Ex. 7.

29. Margaret M. Dunn, vice president, director and a 10% (voting stock) shareholder, is a resident of Ormond Beach, Florida. She is proposed as a full-time cultural affairs director of the station. DBTC Form 301, Section IV-B, Par. 21; DBTC Amendment filed November 13, 1980; DBTC Ex. 1. She has participated in a number of local civic and community activities. DBTC Ex. 10.

30. Family is a corporation organized under the laws of the State of Tennessee. It has 100,000 authorized shares of stock with a par value of $1.00 per share, of which 4,000 shares are issued and outstanding. Family

Form 301, Section II, Par. 9 and Table I; DBTA Amendment filed August 12, 1982. Its shareholders, officers and directors are as follows:

Name	*Office*	*No. of Shares*	*% Voting Ownership*
Doctor R. Crants, Jr.	President & Director	1,540	38.5
Jeanette Dalton	Vice President & Director	600	15.0
Shirley J. Crants	Secretary & Director	–	–
Jack H. Dalton	Treasurer & Director	1,220	30.5
Vanester Brown	Director	80	2.0
Betty Osteen	Director	280	7.0
Lea J. Murray	Director	80	2.0
Farrell B. Jones	–	200	5.0

Family Form 301, Section II, Table I; DBTA Amendments filed August 12, 1982 and September 2, 1982.

31. Doctor R. Crants, Jr. is controlling shareholder in the corporate general partner of Springfield Television Associates, Ltd., permittee of a new television station on Channel 33 in Springfield, Missouri; Farrell B. Jones is the limited partner. DBTA Amendment filed September 2, 1982. Mr. Crants is also an officer, director and non-controlling shareholder in Knoxville Family Television, Inc., permittee of a new television station on Channel 43 in Knoxville, Tennessee. DBTA Amendment filed August 12, 1982.[5]

Comparative Coverage

32. As a result of proposing different powers, antenna heights, radiation patterns and site locations, the proposed primary service (Grade B) contours would encompass different areas and populations as shown below (Joint Ex. 1, Table XI; Joint Ex. 2, Tables IV and V; Joint Ex. 3, Tables III, IV and V):

[5] Principals of Family are also involved in pending broadcast applications, but such applications have no comparative significance. *Hi-Point Broadcasting Co.*, 14 FCC 2d 365, 366 (Rev. Bd. 1968). Doctor Crants for a brief period held a 15% interest in a corporation that was a 40% partner in a permittee of a new television station in Canton, Ohio. Family Amendment filed January 28, 1982. Shirley Crants for a brief period was a 10.9% shareholder of a permittee of a new FM station for Fayetteville, Arkansas. Family Amendments filed January 28, 1982 and May 14, 1982.

Applicant	*Primary Service Area (sq. mi.)*	*Population*
DBC	2,967	261,533
Life Style	6,430	637,551
DBTA	1,834	202,972

Accordingly, Life Style has a coverage advantage in service over both DBC and DBTA.[6] In comparison to DBC, Life Style will serve 3,463 more square miles and 376,018 more people. In comparison to DBTA, Life Style will serve 4,596 more square miles and 434,579 more people. On the other hand, DBC has a coverage advantage over DBTA because it will serve 1,133 more square miles and 58,561 more people.

33. None of the applicants proposes to serve "white" (no existing service) areas. All, however, would provide service to presently underserved areas ranging from "gray" (one existing service) to four existing services. Following is a breakdown of those exclusively served areas and the degree of underservice involved (Joint Ex. 2, Table IV; Joint Ex. 3, Tables III and IV):

		One Existing Service		*Two Existing Services*	
Served by	*Not Served by*	*Area (sq. mi.)*	*Pop.*	*Area (sq. mi.)*	*Pop.*
Life Style	DBC	133	19,504	602	31,853
Life Style	DBTA	133	19,504	602	31,853

		Three Existing Services		*Four Existing Services*	
Served by	*Not Served by*	*Area (sq. mi.)*	*Pop.*	*Area (sq. mi.)*	*Pop.*
DBC	DBTA	203	2,639	287	4,675
Life Style	DBC	330	7,338	642	37,045
Life Style	DBTA	533	9,923	929	41,720

34. Life Style's proposed Grade B contour encompasses the underserved areas within the Grade B contour of each of the other applicants. Additionally, it will provide service to underserved areas not proposed to be served by the other applicants. Following is a tabulation of the existing service to those underserved areas that will be served exclusively by Life Style (Joint Ex. 3, Fig. 1-B; Joint Ex. 2, Table V):

[6] The DBTA coverage is based upon the Family engineering proposal, which was adopted as that of the limited partnership. DBTA has since changed its tower site, but no coverage reduction is effected by the change; and, to the extent there is a coverage increase, the earlier proposal must govern for comparative purposes.

Existing Service	*Area (sq. mi.)*	*Population*
1	108	11,379
2	364	13,364
3	119	4,324
4	208	4,810

35. In establishing the number of services available to the areas encompassed by the proposed Grade B contours of the competing applicants, the following Florida stations were considered (Joint Ex. 3, Table 1-B):

City	*Call*	*Channel*	*ERP (kW)*	*Antenna HAAT(ft.)*
Cocoa	WTGL-TV	52	741	780
Daytona Beach	WESH-TV	2	100	1,650
Gainesville	WCJB-TV	20	501	680
Jacksonville	WAWS-TV	30	2,789*	990
Jacksonville	WJKS-TV	17	4,570*	990
Jacksonville	WJXT-TV	4	100	930
Jacksonville	WTLV-TV	12	316	940
Jacksonville	WXAO-TV	47	1,200*	980
Leesburg	WIYE-TV	55	87	340
Melbourne	WKNA-TV	43	1,780*	990
Orlando	WDBO-TV	6	100*	1,460
Orlando	WFTV-TV	9	316	1,940
Orlando	WOFL-TV	35	2,570*	1,470
St. Petersburg	WTSP-TV	10	316*	1,500
Sarasota	WXLT-TV	40	2,871*	770
Tampa	WFLA-TV	8	316	1,030
Tampa	WTVT-TV	13	316	1,420

*Directional Operation

Ultimate Findings and Conclusions

Air Traffic Hazard Issues

36. The Commission has followed a policy of relying upon the expertise of the FAA in air hazard matters. *Southern Capital Television, Inc.*, 45 FCC 2d 197, 29 RR 2d 511 (1974). The Commission's Rules provide that "[w]henever a 'no hazard determination' is received from the FAA concerning any proposed antenna structure, the antenna structure is deemed not to involve a hazard to air navigation. . . ." 47 C.F.R. § 17.4(d). Since DBC, Life Style and DBTA have received final FAA no hazard determinations, their tower proposals are deemed not to be hazards to air navigation.

Comparative Issue

37. This proceeding involves the mutually-exclusive applications of DBC, Life Style and DBTA to construct a new UHF television station on

Channel 26 at Daytona Beach, Florida. The applicants must be weighed in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965). The *Policy Statement* sets forth two major goals toward which the comparative process is to be directed, *i.e.,* (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communications. *Policy Statement, supra,* at 394.

Diversification of Control of the Media of Mass Communications

38. Diversification of media sources is favored because it advances the first amendment goal of having the widest possible dissemination of information from diverse and antagonistic sources. *Policy Statement, supra,* at 394 n. 4. The touchstone of the policy is this: Diversity among the people who control the information content of vehicles of mass communication fosters diversity of information flowing to the public. Because radio and television stations are important but scarce sources of news and information, preventing a concentration of control of those outlets is deemed to be in the public interest. *Id.*

39. Because of this underlying policy, diversification receives less weight to the extent that ownership interests are (1) so small (particularly less than controlling) that they do not enable the holder to influence the information content of a communications medium; (2) distant from the community being applied for and thus functioning in a separate information market; (3) insignificant in terms of area and audience covered and, therefore, carrying less impact on information received by the public; and (4) in areas well served by various media sources and, therefore, part of an already diverse information environment. *Id.* at 394-95. Similarly, diversification is of diminished importance to the extent there are a number of outlets of mass communication in the community to be served. *Id.* at 395.

40. DBC's 80% stockholder, Anthony C. Kupris, is the owner of television station WMBB, Panama City, Florida. This ownership interest is significant because Mr. Kupris controls both DBC and station WMBB and both are in the same state. Mr. Kupris also controls a 6% limited interest in a Little Rock, Arkansas UHF permittee and is the owner of a construction permit for a television translator station in Tallahassee, Florida. These interests are of limited significance. The Arkansas interest is small and distant from Daytona Beach and translators are not significant outlets of expression.

41. Life Style's principal, J. Kermit Coble, has an ownership interest in the local CATV system in Daytona Beach, Florida which he is required to divest. This interest will be disregarded for diversification purposes. Another principal, Dr. E. J. Daniels, is the owner and president of a

publishing company that produces religious books, magazines and preprints within the Life Style service area and has an interest in four weekly advertising shoppers distributed in certain towns in southern Florida. The company has no editorial control over the material that it prints and the shoppers have no editorial content but consist entirely of advertisements. These interests are not the type with which the diversification criterion is concerned. Moreover, all of Dr. Daniels' media interests are of limited concern because he holds only 18% of Life Style's voting stock. Richard Clark's service as receiver for Hunter-Knight Daytona, Inc., licensee of station WDAT, Ormond Beach, Florida,[7] is immaterial because he is acting in that capacity as an agent of the circuit court and because his connection with WDAT arose after designation and will disappear should Life Style be successful herein. This interest is not regarded as significant.[8]

42. *DBTA.* The Commission's diversification policies are phrased in terms of ownership, *per se.* Accordingly, while DBTC or its principals have no media interests, Family's and its principals' media holdings have to be taken into account.[9] Doctor Crants, the largest stockholder in Family, is the controlling shareholder in the corporate general partner of Springfield Television Associates, Ltd., permittee of a new television station on Channel 33 in Springfield, Missouri. He is also officer, director and 33⅓% shareholder in Knoxville Family Television, Inc., permittee of a new television station on Channel 43 in Knoxville, Tennessee. Doctor Crants is also charged with holding a 15% interest in a corporation that was a 40% partner in a permittee of a new television station in Canton, Ohio, and Mrs. Crants with a 10.9% interest in a permittee of a new FM station in Fayetteville, Arkansas. It appears then that DBTA's media interests are distant and confined to a minority stockholder. Under the rationale of the Review Board's decision in *Cleveland Television Corp.*,

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[7] By amendment filed April 27, 1982, Life Style reported that its principal, Richard Clark, had been appointed by the Circuit Court, Seventh Judicial Circuit, Volusia County, Florida, to be receiver for Hunter-Knight Daytona, Inc., licensee of station WDAT, Ormond Beach, Florida. In that same amendment, Mr. Clark indicated that he would disassociate himself from WDAT if Life Style receives a grant herein.

[8] By request filed March 4, 1983, DBTA asks that official notice be taken of the Review Board decision in *Thomas and Essie Collins,* FCC 83R-11, released February 17, 1983. That case is distinguishable from the fact situation herein. In *Collins,* the principal acted as sales manager on his own prior designation and did not pledge to terminate his connection until after designation.

[9] Family disclaimed any comparative advantage resulting from its merger with DBTC, and the presiding judge and the Review Board expressly conditioned the merger upon its not receiving any comparative advantage. *Memorandum Opinion and Order* FCC 82M-2201, released July 19, 1982; *Order* FCC 82R-51, released August 18, 1982. Although Family's application was dismissed in conjunction with the merger, it remains a party to the proceeding as the 40% owner of DBTA.

52 RR 2d 581 (Rev. Bd. 1982), since Family, as a limited partner, is effectively isolated from the management and control of DBTA, its media interests herein are not of sufficient weight to affect DBTA's status under the diversification criterion. As between Life Style and DBTA, neither is awarded any diversification preference. However, Life Style and DBTA are each awarded a slight preference over DBC.

Best Practicable Service to the Public

Integration of Ownership With Management

43. Participation in the operation of the station by its owners is also a factor of substantial importance in a comparative proceeding. *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, 395 (1965). Full-time participation is of primary significance. To the extent that time spent moves away from full time, the importance of integration declines to the point that no credit is awarded for less than 20 hours per week. *Id.*; *Midwest Broadcasting Company,* 70 FCC 2d 1489, 1494-95(Rev. Bd. 1979), *review denied,* FCC 79-397, released June 22, 1979.

44. Beyond bare integration percentages, the Commission also considers qualitative attributes of the competing integration proposals in its weighing of them. *Policy Statement, supra,* at 395-96. These qualitative attributes are considered to enhance the quantitative degree of integration. Such factors include local residence and past participation in civic affairs, previous broadcasting experience and minority involvement in station management. *TV 9, Inc. v. FCC,* 161 U.S. App. D.C. 361, 495 F.2d 929, *cert. denied,* 419 U.S. 986 (1974).

45. DBC has proposed that 80% of its ownership of voting stock will be integrated on a part-time basis, 20 to 30 hours per week. The Review Board has held that, when integration proposals are stated in terms of a minimum and maximum amount of time to be devoted to the station, only the minimum amount will be credited. *Midwest Broadcasting Company, supra.* Mr. Kupris' integration credit is enhanced by his broadcast experience derived from his ownership and direction of television station WMBB, Panama City, Florida.

46. Life Style has proposed that the owner of 7.2% of its voting stock will be integrated on a full-time basis as general manager of the station and that five owners of an additional 12% of its voting stock will be integrated into station operations on a part-time basis (*i.e.,* 24 hours per week). Life Style's integration proposal is enhanced in a number of respects. The proposed general manager is currently a resident of Daytona Beach, has lived in the Daytona Beach area for 15 years and is credited with civic involvement in the Daytona Beach area, and has past broadcast experience. The five other Life Style principals proposed for part-time integration are also long-time residents of Daytona Beach or its

environs, and all have been actively involved in the affairs of the community. In addition, Ms. Gillespie has broadcast experience and is a woman (*see Gainesville Media, Inc.*, 72 FCC 2d 799, 43 RR 2d 604 (Rev. Bd. 1978); and Dr. Moore is a Black who has been actively involved in minority-related educational institutions and community work.

47. DBTA proposes 30% full-time integration[10] and no part-time integration. Its integration is enhanced by local residence and civic participation (some city of license, some service area) and the 20% integration of women.

48. The Commission is primarily interested in full-time participation, and the credit given for part-time participation drops sharply as the hours of work proposed drop below 40. *Policy Statement, supra*, at 395. Life Style will receive a slight preference over DBC. DBTA possesses a clear quantitative edge over Life Style. DBTA's and Life Style's proposals are both enhanced by local residence, civic activities and participation by women and/or minorities; however, Life Style deserves slight credit for Sally Gillespie's broadcast-related experience. DBTA has a qualitative edge over Life Style because so much more of its integration (30% full time) is qualitatively enhanced. DBTA deserves a moderate preference over Life Style for integration.

Comparative Coverage

49. Life Style's engineering proposal encompasses more territory and population than DBC's and DBTA's proposals. Life Style, though, would provide no service whatever to "white" areas. Life Style would provide a second service to 19,504 more people than either of its competitors, but this is only 1/31 of its total coverage of 637,551. The record also indicates that, of the population that Life Style's Grade B contour would reach but DBC's would not, 84% of those people would only receive a fifth or higher Grade B television service from the Life Style proposal; and of the population that Life Style's Grade B contour would reach but DBTA's would not, 86% of those people would only receive a fifth or higher Grade B television service from the Life Style proposal. The relative coverages of DBC and DBTA are even less significant in this regard. Although DBC enjoys somewhat larger coverage, 96% of the population reached by DBC but not by DBTA is already served by four or more television services. Based on the foregoing, in order of preference, Life Style's coverage is first, followed by DBC's, and DBTA's third. Life Style's coverage, however, warrants only a slight preference in light of the substantial current service in the area. The Commission has held that greater area

[10] The Commission does not consider the interests of limited partners relevant to determining integration credit. Family's lack of integration proposal does not diminish DBTC's proposed integration. *Anax Broadcasting Inc.*, 87 FCC 2d 483, 488 (1981).

coverage enjoys less significance where the respective reception areas are well served. *Simon Geller*, 90 FCC 2d 250, 276 (1982).[11]

Final Comparative Evaluation

50. Life Style and DBTA each have a slight preference over DBC on the diversification criterion. However, as between themselves, neither is awarded a diversification preference. Under the best practicable service criterion, DBTA merits a moderate preference for integration over Life Style and DBC. However, Life Style receives a slight preference for coverage over DBC and DBTA. Thus, on balance, DBTA ranks first under the best practicable service criterion, with Life Style second and DBC last. When all the preferences are weighed, DBTA is the winner. It is, therefore, concluded that a grant of DBTA's application will better serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Daytona Beach Television Associates, Ltd. (File No. BPCT-800811KH) for a construction permit to build and operate a new UHF television station on Channel 26 at Daytona Beach, Florida, IS GRANTED and the applications of Life Style Broadcasting, Inc. (File No. BPCT-800811KF) and Daytona Broadcasting Company, Inc. (File No. BPCT-800811KE) ARE DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION

JOHN M. FRYSIAK *Administrative Law Judge*

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[11] In post-hearing filings, DBTA requested that official notice be taken of station WMFE-TV, Orlando, Florida, coverage map. Since the Bureau and the other parties dispute the accuracy of the map, the request is denied. Nor has official notice been taken of the various cable systems that exist in the proposed service area.

[12] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Educational Noncommercial Broadcast Service
Education Noncommercial FM Station, Limitations
Education Noncommercial FM Station, Use of
Education Noncommercial TV Station, Limitations
Education Noncommercial TV Station, Use of

On reconsideration, the Commission amended its policy governing underwriting and donor acknowledgements aired by public broadcasters to permit the use of brand and trade names as well as product or service listings. It also clarified its policy that fundraising that altered or suspended programming was permitted only for the benefit of the station itself.

—*Educational B/cing Stations*
Docket No. 21136

FCC 84-105

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations	Docket No. 21136

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1984; Released: March 28, 1984

BY THE COMMISSION:

Background

1. The *Second Report and Order* in Docket No. 21136 ("*Second Report*")[1] concluded a two year proceeding designed to evaluate the financial needs of public broadcasters and examine alternative methods of fundraising within the framework of providing a noncommercial service. The Commission liberalized prior restrictions upon public broadcasters' fundraising activities by amending 47 C.F.R. §73.503 and 47 C.F.R. § 73.621. Subsequently, Congress enacted the Public Broadcasting Amendments Act of 1981 ("1981 Amendments") to ensure that the public

[1] 86 FCC 2d 141 (1981).

telecommunications media remained financially viable in the wake of substantial reductions in Federal funding by expanding public broadcasters' ability to generate increased private financial support.[2] The legislation contained in Section 399A[3] and Section 399B[4] of the 1981 Amendments (47 U.S.C. §§399A and 399B) closely paralleled the Commission's *Second Report*.[5] However, the Commission noted that the subsequently enacted legislation differed from the *Second Report* in several respects, and thus modified and clarified its rules and policies to conform

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[2] Section 1231 of the Ominibus Budget Reconciliation Act of 1981, P.L. 97-35, 97th Cong., 1st Session (1981), amended the Communications Act of 1934.

[3] Section 399A provides:

(a) For purposes of this section, the term "business or institutional logogram" means any aural or visual letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying any corporation, company, or other organization, which is not used for the purpose of promoting the products, services, or facilities of such corporation, company or other organization.

(b) Each public television stations and each public radio station shall be authorized to broadcast announcements which include the use of any business or institutional logogram and which includes a reference to the location of the corporation, company, or other organization involved, except that such announcements may not interrupt regular programming.

(c) The provisions of this sections shall not be construed to limit the authority of the Commission to prescribe regulations relating to the manner in which logograms may be used to identify corporations, companies or other organizations.

[4] Section 399B provides, in pertinent part:

(a) For purposes of this section, the term 'advertisement' means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended –

(1) to promote any service, facility or product offered by any person who is engaged in such offering for profit;

(2) To express the views of any person with respect to any matter of public importance or interest; or

(3) to support or oppose any candidate for political office.

(b) (1) Except as provided in paragraph (2), each public broadcast station shall be authorized to engage in the offering of services, facilities or products in exchange for remuneration.

(2) No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement.

[5] Essentially, the *Second Report:* (1) eliminated the "name only" requirement for donor and sponsor acknowledgements and provided for the inclusion of informational, but not promotional, messages; and (2) permitted the broadcast of promotional announcements deemed in the public interest for which no consideration was received. Similarly, Section 399A permitted informational, but not promotional, messages in donor and sponsor acknowledgements and Section 399B prohibited the broadcast of promotional announcements for remuneration.

to the Congressional mandate. *Memorandum Opinion and Order* in Docket No. 21136 (*"1982 Order"*), released July 30, 1982.[6] Among others things, the *1982 Order* reiterated Commission policy that donor acknowledgements could include informational – but not promotional – messages, and further clarified that policy to prohibit the specific mentioning, listing or promoting of a donor's product lines or services, thereby reconciling an apparent inconsistency between the *Second Report* and Section 399A. The Commission also construed the 1981 Amendments as not permitting the use of brand or trade names in underwriting acknowledgements aired by public broadcasters.[7]

2. Several petitions for reconsideration have been filed with the Commission regarding its clarification of the above policy. Additionally, an informal request for interpretation of the general impact and effect of the *1982 Order* has been filed. In the interest of expediting consideration of the issues raised, we will address both the petitions for reconsideration and the request for interpretation.

Petitions for Reconsideration

3. *Arguments.* The petitioners[8] requested that the Commission reconsider the *1982 Order* and permit the inclusion of brand or trade names of products or services in donor acknowledgements. It is argued that a specific reference to a donor's product or service does not compromise or jeopardize the noncommercial nature of public broadcasting, nor is it necessarily promotional in the absence of comparative or qualitative language. Rather, the inclusion of such references in donor acknowledgements is useful, and often necessary, where a brand or trade name has recognition value and a corporate underwriter's name does not.[9] NPR, PBS and NAPTS also represented that public broadcasters interpreted the *Second Report* to allow the nonpromotional identification of a specific product and/or service in donor acknowledgements, and revised their underwriting rules accordingly. They contended that this change resulted

[6] 90 FCC 2d 895 (1982).

[7] Additionally, the Commission revised its rules to: (1) restrict the scheduling of donor acknowledgements so that regular programming is not interrupted, consistent with Section 399A; and (2) allow promotional announcements *sponsored* by nonprofit entities, consistent with Section 399B. The Commission also further clarified its policy to permit aural, as well as visual logograms in donor acknowledgements.

[8] Petitions for reconsideration were filed by National Public Radio (NPR); the National Association of Public Television Stations (NAPTS) and the Public Broadcasting Service (PBS); the Corporation for Public Broadcasting (CPB) and the law firm of Schwartz, Woods & Miller (Schwartz) on behalf of several public broadcast licensees.

[9] As NPR stated, "[T]here are many situations where attempted identification of a contributor without reference to its product by trade name is practically meaningless. For instance, the Great Water Company of France, Inc., is unknown to most people. But to say it is the bottler of 'Perrier' mineral water clearly identifies the company to many."

in a dramatic increase in donations and underwriting.[10] The elimination of specific references to products and/or services in donor acknowledgements, they stated, will hinder public broadcasters in their efforts to generate additional financial support from the private sector that is vital to their continued survival. Finally, most of the parties considered the Commission's posture in the *1982 Order* and its interpretation of the recent legislation to be unnecessarily restrictive, particulary in light of: (1) the broad statutory language of Section 399A which delineates the information that may be included in donor acknowledgements; and (2) the explicit grant of authority to the Commission to further regulate in this area.[11] They contended that the legislation marks a starting point from which the Commission could and should explore and expand public broadcasters' opportunities to broaden their financial base of support by attracting new, diverse sponsors and donors. In this respect, it should be noted that NPR differs from the other petitioners in that it construed Section 399A(c) as proscribing the Commission's power to regulate the content of donor announcements, confining our authority to the "manner" (*i.e.*, timing and frequency) of donor announcements. Finally, all the petitioners urged that a more liberalized approach to donor acknowledgements would serve the spirit and intent of the Public Broadcasting Amendments Act of 1981 by enhancing public recognition of donors as well as contributions from the business community.

4. In a related context, PBS, NAPTS and Schwartz sought reconsideration of that aspect of the *1982 Order* concerning logograms. They believe that it is unnecessary and inappropriate to distinguish logograms that promote (as unacceptable) from those that merely identify (as acceptable),

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[10] In this regard, NPR stated:

> Total revenues for NPR member stations from program underwriting grants for the year ending June 30, 1981, are estimated to have been about $4.2 million. This figure increased dramatically to about $7 million for the year ending June 30, 1982, due largely to the new more relaxed policies concerning acknowledgements, of which the use of trade names was a key factor. By being able to identify donors more clearly and explicitly, radio licensees were able to increase support from the business community by nearly 75% in just one year. [They] project that there currently exist program underwriting agreements with public radio stations with a total value of over $1 million which specifically involve mentioning the program underwriter's product or service by trade name. Further, at the time of the release of the [1982] Order, public radio stations were involved in negotiations with prospective program underwriters on agreements with a total value of $2.5 million specifically contemplating the use of trade names in the acknowledgement announcements and which, in the judgment of the stations, are likely not to be consumated in view of the *[1982] Order* restricting the use of trade names.

[11] Section 399A, as proposed in H.R. 3238, was fully adopted by the Conference Committee. However, the Conference Committee also added the provision contained in Section 399A(c) empowering the Commission to further regulate in this area. *See* n.3, *supra*.

and that such distinctions only create confusion and uncertainty. Schwartz noted:

> [L]ogograms serve a critical identifying function which transcends whatever slight promotional element may inhere in them. The only rational approach in this area is to view all *bona fide* logograms as proper devices which serve the fundamental purpose of generic identification.

Moreover, according to NAPTS and PBS, corporations mainly contribute funds to public broadcasting to improve their image by association with quality programming, and that their logograms not only identify corporations but project their image by representing their "face[s] to the world." They concluded that inclusion of all logograms, as with brand and trade names, would encourage and facilitate greater contributions to public broadcasting and would more fully identify corporate donors.

5. As an alternative to further liberalizing Commission rules to permit the inclusion of a brand or trade name and all logograms in donor announcements, NPR, CPB and Schwartz offered various suggestions. NPR also believed that the *1982 Order* cast a heavier burden upon public radio than public television since it did "not appear to limit the use of pictorial designs or symbols which may also be trademarks of donors in the acknowledgement announcements broadcast by public television stations," yet public radio stations, which cannot make use of such visual symbols or signs, were granted no equivalent flexibility. NPR, thus, recommends that the Commission afford public radio stations greater opportunities to attract financial support by allowing them to broadcast "trade names in acknowledgement announcements in lieu of the visual trademark which television stations are still able to use."

6. Unlike the other petitioners, CPB viewed a general rule permitting a brand or trade name in every announcement as unnecessarily broad and contrary to the "identification vs. promotion" test established by the *Second Report* and ratified by Congress in Section 399A. CPB proposed a more limited standard, whereby a brand or trade name would be allowed if the underwriter does not offer products or services under its corporate name. CPB declared that "this standard provides an objective test of whether an underwriter will be recognized under its corporate name and, therefore, whether use of a trade name is necessary for the purpose of identifying the underwriter to the public."

7. Finally, Schwartz suggested that if the Commission determines not to modify its underwriting rules, a transitional period for the implementation of the *1982 Order* is warranted. Since public broadcasters had construed the *Second Report* as sanctioning the inclusion of a brand or a trade name in donor announcements, they had changed their underwriting rules and, "produced programs, or made commitments to produce programs, which include such credits." Schwartz stressed that "it would be unfair to require that substitute credits be produced for this program-

ming, because of the cost involved and because of the problems which might be created with respect to some underwriters which expected credit in the form normally provided by the licensees as of the date of their donation commitments."

8. *Discussion.* Essentially, the issues raised by the petitions involve statutory construction. At the outset, we note that, contrary to NPR's assertion, we do not believe that Section 399A(c) undercuts our authority to regulate commercial speech on public broadcast stations. 47 U.S.C. §303(a) and (b) generally empowers the Commission to classify radio stations and to determine and prescribe the nature of the service rendered by each designated class of licensed stations. Pursuant to that power, the Commission's authority to "establish categories of communications services, confine their use to particular frequencies and determine the kinds and types of communications which fall within the authorized categories"[12] is well recognized and long established.[13] Rather than constraining this authority, we construe Section 399A(c) as explicit recognition of the Commission's general regulatory function, specifically directing us to further exercise our rule making authority in a manner consistent with the 1981 Amendments.

9. Section 399A ratified and codified the "identification vs. promotion" standard for donor acknowledgements enunciated in the *Second Report.* In delineating the information which these acknowledgements may incorporate, Section 399A provided for the nonpromotional use of visual or aural logograms (*i.e.*, any "letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying" the donor and "which is not used for the purpose of promoting the [donor's] products, services or facilities") and permitted identification of the donor's location. But, as we observed in the *1982 Order* , Section 399A did not address the permissibility of including information regarding the donor's specific product lines or services.[14] Since the statute was silent, we reviewed the associated legislative history carefully. Because the Senate and the Conference Committee accepted the House provisions without issuance of explanatory reports, the *House Report* became the source for our analysis. The *House Report* declared the "logograms [and slogans should] be value neutral, and solely for the purpose of generic identification . . ." and that "products or services [or the listing of products or services should not be] included as part of such announcements at this time."[15] The

[12] *First Report and Order* in Docket No. 21136, 69 FCC 2d 200, 204 (1978).

[13] *See, e.g., Gross v. FCC,* 480 F. 2d 1288 (2d Cir. 1973) (FCC has the power to prohibit commercial messages on amateur radio station facilities); and *Lafayette Radio Electronics Corp. v. U.S.,* 345 F. 2d 278 (2d Cir. 1965) (FCC has the power to limit the uses of Citizens Radio stations).

[14] *1982 Order* at 902.

[15] *House Report, supra* at 24.

subsequent examples given of permissible and impermissible donor acknowledgements under this standard clearly indicated that the use of brand or trade names was not allowed.[16]

10. Given this explicit language, we determined in our *1982 Order* that it was inappropriate at that time to allow the use of trade names, or product and service listings. It is important to note, however, that the concerns expressed in the *House Report* were not based on a finding that expanded donor acknowledgements were incompatible with public broadcasting service or that this mechanism would prove ineffective as a means of enhancing self-generated financial support for public stations. To the contrary, after describing the Commission's *Second Report*, in which we initially sanctioned enhanced underwriting acknowledgements, the *House Report* stated:

> The Committee endorses this effort, particularly in light of declining Federal funds, and supports the Commission's belief that these changes will not change the nature of the noncommercial service that stations have been licensed to serve.[17]

Rather, the restrictions imposed by the *House Report* on such enhanced donor acknowledgement techniques as product or service listings were founded on a perception that the *Second Report* "went too far *in a single step*" (emphasis added). This sensitivity to the timing, rather than the substance, of permitting more expansive underwriting acknowledgements was repeatedly underscored elsewhere in the *House Report*. It stated, for example, that:

> In limiting the Commission's decision to allow listings of products and services, the Committee intends that no such listings be allowed *until* the changes made in the legislation are more fully evaluated. The Committee intends to review this area more fully as part of its consideration of the Commission (TCAF) study required by the bill (emphasis added).[18]

11. Almost three years have passed since the enactment of the 1981 Amendments. There are now substantial indications that expanded underwriting acknowledgements can significantly benefit public broadcasters.[19] Moreover, the Temporary Commission on Alternative Financing for Public Telecommunications (TCAF), established by the 1981 Amendments, has completed its study and has submitted its final report to Congress.[20] TCAF exhaustively studied and evaluated funding sources that would augment the dwindling Federal support available for public broadcasting. Part of their statutory charge was to make recommenda-

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[16] "[A] logogram . . . could not contain: 'XYZ Oil Corporation, of New York, manufacturers of Super 94 unleaded gasoline.' " *House Report, supra* at 23.

[17] *House Report, supra* at 23.

[18] *House Report, supra* at 24.

[19] *See* n.10, *supra*.

[20] *Temporary Commission on Alternative Financing for Public Telecommunications*, Report to Congress (October 1, 1983). Hereafter *TCAF Report*.

tions for new funding sources that would enhance public broadcasting's income from private sources while still preserving the independence and quality of public broadcasting programs.[21] After concluding its comprehensive review of not only alternative funding sources but also the public broadcasting industry and the public it serves, TCAF found that broadened guidelines for program underwriting would indeed help to provide much needed revenues for public broadcasting services. The *TCAF Report* specifically recommended that Congress:

> Direct the Federal Communications Commission to modify its policies concerning underwriting acknowledgements to permit public broadcasters to identify supporters by using brand names, trade names, slogans, brief institutional type messages and public service announcements.[22]

12. In view of these developments, we believe that the conditions set forth in the *House Report* as the basis for its limitations on the use of enhanced donor acknowledgements by public broadcasters have now been met and that the restraints imposed by our *1982 Order* in response to the *House Report* are ripe for reexamination. In this regard, we again note that the statutory language of Sections 399A and 399B does not itself restrict enhanced underwriting acknowledgements as herein described and that the provisions of Section 399A(c) support our belief that we are not constrained statutorily from exercising our general rule making power in this area.

13. After reviewing the restrictions embodied in our *1982 Report*, the arguments presented by the parties to this proceeding, and the specific findings and recommendations of the TCAF, we are persuaded that it is now advisable as a matter of policy and permissible as a matter of statutory authority to authorize public broadcast stations to expand the scope of their underwriting announcements. As we recognized in the *Second Report*, and as both the *House Report* and the *TCAF Report* indicated, this mechanism offers significant potential benefits to public broadcasters in terms of improving the financial self-sufficiency of the service, yet, properly limited, does not threaten its underlying noncommercial nature. Accordingly, we are granting the petitions for reconsideration to the extent that henceforth public broadcast stations will be permitted to use trade and brand names, as well as product and service listings, in their donor acknowledgements. We emphasize, however, that such announcements may not include qualitative or comparative language

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[21] Omnibus Budget Reconciliation Act of 1981, *supra* n.2 at § 1232(a)(3).

[22] *TCAF Report*, *supra* at 45. Moreover, we note that in a joint letter to the Commission dated March 8, 1984, both the Chairman of the Senate Subcommittee on Communications and the Chairman of the House Subcommittee on Telecommunications, Consumer Protection and Finance concluded that it would be appropriate at this time for the Commission to review its policy concerning underwriting acknowledgements aired by public broadcast stations.

and that this action is not to be construed as allowing advertisements, as defined in Section 399B, to be carried by public broadcasting stations. To summarize, donor acknowledgements utilized by public broadcasters may include (1) logograms or slogans which identify and do *not* promote, (2) location, (3) value neutral descriptions of a product line or service, (4) brand and trade names and product or service listings.

Request for Interpretation or Clarification

14. The State of Wisconsin-Educational Communications Board and Ohio State University, licensees of noncommercial stations ("licensees"), filed an informal request for interpretation of the *1982 Order*, in which they posed the following questions for our consideration:

(1) How often may underwriting announcements be broadcast and in what manner with respect to program format?

(2) In the context of announcement schedules, what constitutes regular programming?

(3) Are public broadcasting licensees now permitted to interrupt regular programming to raise funds for non-station purposes?

The licensees expressed concern that public broadcasters "may be unnecessarily inconvenienced" if these questions remain unresolved. In the interest of avoiding possible confusion and inconvenience, we will address the licensee's concerns and discuss each question separately.

15. First, the licensees claimed that public broadcasters should be allowed to schedule underwriting announcements, as opposed to donor acknowledgements, at their discretion–unhampered by the limitation that such announcements shall not interrupt programming. They suggested that public broadcasters should be permitted to schedule underwriting announcements "at places in the sponsored program and with such frequency as full disclosure and identification of the sponsor may warrant." In this regard, they noted that underwriting announcements are mandatory under 47 U.S.C. §317 and 47 C.F.R. §73.1212 if consideration (in the form of programming, material, money, services or other valuable consideration) is provided as an inducement for the broadcast of specific programming, whereas announcements acknowledging general monetary or other in-kind contributions are discretionary. Given the mandatory nature of underwriting sponsorship identification announcements and the importance of informing the public by whom they are being persuaded[23], they declared that such announcements should be accorded different treatment.

16. The *Second Report* eliminated all timing and frequency restrictions for the broadcast of underwriting and donor acknowledgements since audience resistance was viewed as a sufficient deterrent to the

[23] *Applicability of Sponsorship Identification*, 40 FCC 2d 141 (1963).

excessive scheduling of acknowledgements. However, the subsequently enacted legislation, contained in Section 399A, not only delineated that information which may be included in credit acknowledgements, but further contained a caveat: the scheduling of such acknowledgements may not interrupt regular programming. Section 399A did not distinguish between underwriting and donor acknowledgements, rather, both types of acknowledgements are treated alike. As previously stated in our *1982 Order*, we changed our rules to conform to the legislation, and accordingly imposed the same restriction upon the scheduling of underwriting and donor acknowledgements. Therefore, irrespective of the different nature and underlying purpose of underwriting acknowledgements, as opposed to donor acknowledgements, all such acknowledgements are subject to the same restrictions regarding: (1) information that may be included; (2) scheduling.

17. Second, the licensees asserted that the limitation upon the scheduling of acknowledgements (*i.e.*, underwriting and donor acknowledgements) may inhibit station fundraising activities which include–but are not limited to–auctions, marathons, and pledge weeks. They stated that the scheduling limitations on acknowledgements should not apply to fundraising activities, since such activities are not considered part of the station's regular programming.

18. In the *1982 Order*, "regular programming" was referred to and discussed in terms of its conventional meaning. Clearly, regular programming encompasses those programs which the public broadcaster ordinarily carries, but does not encompass those fundraising activities that suspend or alter their normal programming fare. Thus, during periods in which such fundraising activities are being conducted the restriction that acknowledgements shall not be scheduled so as to interrupt regular programming would neither be applicable nor appropriate, and the public broadcasters are free to broadcast acknowledgements as often and for as long as they choose, so long as the content of the acknowledgements is consistent with the governing legislative and regulatory rules.

19. Third, the licensees stated that in the *1982 Order* we instituted a substantive change, without any discussion, of our prior policy regarding the prohibition against on-the-air suspended fundraising activities on behalf of other organizations. They cited the *1982 Order* as providing that "... public broadcasters are generally prohibited from engaging in fundraising on behalf of any entity *other than the licensee* where such activities substantially alter or suspend regular programming" *(emphasis added)*[24] and compared that language to that of the *Second Report* which provided that "... station fundraising activities which significantly alter a station's normal programming, including auctions, marathons, member-

[24] *1982 Order, supra* at 907.

ship drives, etc. should be carried on for the benefit of the *station only*, and not for other organizations *(emphasis added)*.[25] They contended that the substitution of the term "licensee" for that of "station" extends the permissible area of suspended programming beyond those activities designed to raise support for the station's operations to include activities designed to benefit the licensee's other non-station institutional business or state operations. Consequently, they feared that "stations licensed to such entities may be increasingly importuned to conduct fundraising appeals for other departments of agencies of the licensees."

20. The licensees' point is well taken. In the *1982 Order* the terms noncommercial or public broadcasting stations or licensees were used interchangeably. However, in the context of suspended fundraising activities the substitution of "licensees" for "station" had the unintended effect of expanding potential beneficiaries beyond that of the station, itself. Therefore, we will henceforth interpret and limit the language of the *1982 Order* as applying to *station operations* only. In the absence of a waiver, noncommercial stations are prohibited from conducting any fundraising activity which substantially *alters* or *suspends* regular programming and are designed to raise support for any entity other than the station itself.[26]

Conclusion

21. In accordance with the Public Broadcasting Amendments Act of 1981, we are granting the Petitions for Reconsideration to allow the broadcast of specific brand or trade names and product or service listings. Therefore, donor acknowledgements may include: (1) a logogram or slogan that identifies but does not promote; (2) locations; and (3) value neutral descriptions of a product line or service; (4) trade names, product or service listings that aid in identifying the donor. Additionally, the language of the *1982 Order*[27] is modified, to clarify that public broadcasters are generally prohibited from engaging in fundraising activities which

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[25] *Second Report, supra* at 158.

[26] It should also be noted that the licensees urged that 47 C.F.R. §73.503 and §73.621 be revised. The pertinent language as changed by the *Second Report*, is as follows: "Moreover, acknowledgements of contributions *can* be made" (emphasis added). They recommended that "may" be substituted for "can," since the sentence acknowledges the permission for such announcements, not their ability to be broadcast." We agree that the suggested change is grammatically correct. However, we do not believe that amendment of the rules to incorporate this change is warranted. It is evident that our rules are not intended as mere observations concerning the physical capacity of public stations to transmit these announcements, but instead are intended to address the permissibility of airing them. In any event, both of the subject rule sections contain note references to the *Second Report* and the *1982 Order*, should further clarification of this point be required.

[27] *1982 Order* at 907.

suspend or alter regular programming on behalf of any entity other than the station itself.

Accordingly, IT IS ORDERED That, the "Petitions for Reconsideration" ARE GRANTED, to the extent indicated above.

IT IS FURTHER ORDERED That, the "Request for Interpretation or Clarification" IS GRANTED, to the extent indicated above.

IT IS FURTHER ORDERED That, the Secretary SHALL CAUSE this *Memorandum Opinion and Order* to be printed in the FCC Reports.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

Consent of Origination Station, See Also Rebroadcasts Translator FM

Commission returned applications as unacceptable for filing. Requisite elements constituting express written retransmission consent of originating station under Section 325(a) of the Act and Section I, Question 4(b) of FCC Form 346 include applicant, community and output channel, as specified in the application. Proposal to rebroadcast designated primary station must be technically feasible under Section 74.1231(b) of the Rules.
—*E. Kaye Johnson*

FCC 84-109

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of
Community Translator Associates (CTA), Low Power FM Radio, Inc. (LPFM) and Edward M. Johnson
For new commercial FM translator stations

Adopted: March 29, 1984 Released: April 6, 1984

E. Kaye Johnson
709 North Webb Avenue
Crossville, Tennessee 38555

Dear Ms. Johnson:

This refers to your 807 applications for new commercial FM translator stations, captioned in the attachment to this letter. These applications have been received by the Mass Media Bureau (Bureau) as tendered for filing. This letter concerns the acceptability for filing of these applications, based on the sufficiency of the express written retransmission consent which you certify has been granted by the proposed primary stations. The history of these applications and the details respecting the retransmission consent at issue herein, are as follows:

Several hundred of these applications were originally filed either by Community Translator Associates (CTA) or Low Power FM Radio, Inc. (LPFM). The CTA and LPFM applications were signed by Edward M. Johnson (Johnson), as sole owner of the respective corporate applicants. Each application affirmatively certified to the grant of express written retransmission consent from the proposed primary station. Nine of the thirteen CTA applications filed October 12, 1983, which appeared on the Bureau's November 22, 1983 FM translator cut-off

list, were contested. Some of the petitions to deny included affidavits by representatives of the licensees of the proposed primary stations which supported the petitioners' objections to those applications on the ground that retransmission consent had not, in fact, been granted.

By correspondence dated December 9, 1983, Johnson amended all of the CTA and LPFM applications to change the response to Section I, Question 4(b) of FCC Form 346 regarding retransmission consent from "Yes" to the following statement:

> "Before program test transmission is started, permittee will obtain consent of the primary station whose programs are proposed to be retransmitted, and the Commission will be notified that written consent has been received."

In addition, the amendment changed the applicant from Johnson to you, E. Kaye Johnson. It is noted that Johnson is the owner of Edward M. Johnson & Associates Inc., your consultant.

On December 21 and 22, 1983, you submitted 87 additional applications for new FM translators, each including the above-quoted statement regarding retransmission consent. By correspondence dated December 21 and 23, 1983, the Bureau returned as unacceptable for filing 31 of the applications amended on December 9, 1983, and all 87 of the applications submitted on December 21, and 22, 1983, on the ground that the failure to certify in the affirmative that written retransmission consent had been granted rendered the applications incomplete and patently defective. The latter applications were not given reference numbers because they were returned without having been received as tendered for filing.

By correspondence dated December 28, 1983 and January 30, 1984, Johnson responded in your behalf to the Bureau's letters returning the applications. Johnson cited *Board of County Commissioners, Monroe County, Florida*, 45 RR 2d 1365 (1979), and *Tele-Media Corporation* v. *Federal Communications Commission*, 52 RR 2d 1571 (U.S. App. D.C., 1983), in support of the proposition that written retransmission consent is not legally necessary under Section 74.1284(b) of the Commission's Rules until immediately prior to commencement of actual translator operations. Section 74.1284(b) provides, in pertinent part, that '. . .the licensee of the FM translator shall certify that written retransmission consent has been received from the licensee of the station whose programs are transmitted."

The Bureau's February 10, 1984 correspondence to you clarified that the above-cited cases were concerned with prior retransmission consent by program syndicators, not primary stations, and that the Court in *Tele-Media* indicated that the Commission could require consent during the processing stage in order to avoid authorizing a station which may be unable to perform within the prescriptions of Section 325(a) of the Communications Act. Section 325(a) provides, in relevant part, ". . .nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the *express authority* of the originating station." [Emphasis added.] The Bureau also explained that the Court's position in *Tele-Media* was premised on the Commission's finding in *Springfield Television Broadcasting Corporation*, 34 FCC 2d 830 (1972), that the grant of a translator station to an applicant failing to affirmatively certify that express written retransmission consent has been received would be a "futile act."

Despite his objections, Johnson advised the Commission in his December 28, 1983 letter that you had requested documentation of consent from each station proposed to be rebroadcast, which would be submitted as amendments to your applications in order to render them "substantially complete and not patently defective." That documentation, which was received by the Bureau as an attachment to Johnson's January 30, 1984 letter, and is under consideration herein, consists of a one-page form letter on Johnson's consulting firm's stationary, addressed "Dear Broadcaster," which states, in pertinent part:

"We have clients who wish to build, at their expense, Low Power FM Translators throughout the country. Some of these clients may wish to rebroadcast your FM radio station, along *with your* commercials, at *absolutely* no cost to your station! An FM translator operates on a different channel and causes no interference. If you would like us to list your station for retransmission, please sign the bottom of this letter and return it to our office. You will be under no obligation and can change your mind later if you wish." [Emphasis in original.]

At the bottom of the page, under *Johnson's* signature, is a line captioned "AGREEABLE" with space for a signature, and a listing of the station's call sign, city and state.

On January 25, 1984, based on Johnson's receipt of signed form letters from numerous FM stations which had been solicited as part of his mailing of this letter to FM broadcasters nationwide, you amended the applications previously returned by deleting the paragraph concerning future certification of retransmission consent and checking the "Yes" box under Section I, Question 4(b) of FCC Form 346, and submitted the applications for refiling. In addition, the applications which were not returned were amended, at this time, to designate a new proposed primary station.

At the outset, we affirm our finding in *Springfield Television, supra*, that the Commission may require an applicant to certify to the grant of express written retransmission consent by the primary station proposed to be rebroadcast. FM translators are licensed, in accordance with Section 74.1284(b) of our Rules, for the limited purpose of rebroadcasting another FM station or FM translator station. Consequently, the Congressional mandate embodied in Section 325(a) of the Communications Act, proscribing broadcast stations from rebroadcasting any part of another broadcast station's program without "express authority," is applicable to the entirety of an FM translator's transmissions, except originations authorized under Section 74.1231(g) of our Rules. Thus, an FM translator application which fails to affirmatively certify the receipt of express written retransmission consent from the proposed primary station may be returned as unacceptable for filing, even if the application is otherwise acceptable, since a grant of that application would be a "futile act."

The written documentation of retransmission consent which forms the basis of your affirmative certification in these applications is insufficient. This conclusion is premised on the failure of that consent to be "express." The requirement of "express" consent by an originating station ensures retransmissions by broadcast stations in accordance with the provisions of the copyright laws, and protects broadcast stations from unauthorized uses of their programs. Thus, the requisite elements of express consent must not only ensure operation of the broadcast station retransmitting another broadcast station within the ambit of Section 325(a) of the Act, but also must provide the originating station with actual knowledge of the party requesting consent, and the scope and purpose of the proposed retransmissions. Thus, we find that consent by a proposed primary station is "express" only when the written document embodying the parties' agreement references the applicant, the proposed community of service and output channel, as specified in the FM translator application. The Johnson form letter lacks all three critical elements of express consent.

In addition, the clause in the Johnson form letter which relieves the proposed primary stations of any obligation to permit the retransmission of their signals evidences that there is no firm agreement between you and the stations. The tentativeness of this arrangement undermines the purposes for the requirement of express consent, and results in the likelihood that the authorization of these translators by the Commission would be a futile act. On this independent ground, the retransmission consent granted by the proposed primary stations also fails to be "express" within the meaning of Section 325(a) of the Act.

As a related matter, we also find that the manner employed to designate the new proposed primary stations in some of the amended applications has resulted in technically infeasible proposals. It appears that these applications were amended by matching the community to be served specified in individual applications with the closest FM station returning a signed form letter. The latter station was then proposed to be the primary station for that application, without regard to the practicability of receiving its signal directly through space, as required under Section 74.1231(b) of our Rules, assuming operation via another translator was not proposed. Technically infeasible proposals, absent appropriate waiver requests, would be, by themselves, sufficient reason to return the applications as unacceptable.

Accordingly, in light of our conclusion that the retransmission consent certified to by you in Section I, Question 4(b) of FCC Form 346 is insufficient under Section 325(a) of the Communications Act, the aforementioned applications are hereby deemed UNACCEPTABLE FOR FILING. The applications will be returned under separate cover.

BY DIRECTION OF THE COMMISSION*

WILLIAM J. TRICARICO *Secretary*

* Commissioner Patrick not participating.

Remand From Court of Appeals
Reopening of Record
Right to File Pleading

Absent a direction by the Court of Appeals to do otherwise, Section 402(h) of the Communications Act of 1934, as amended, requires the Commission to proceed on remand. Petitioners' unsolicited and unauthorized pleading, which attempts to comment and argue matters based not only on the existing records, but also new facts and arguments not previously raised, was properly rejected by the Commission.
—*First Charleston Corp. (WCIV-TV)*

FCC 84-134

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
FIRST CHARLESTON CORP (WCIV(TV)) Charleston, South Carolina	File No. BPCT-800521KS
SOUTH CAROLINA EDUCATIONAL TELEVISION COMMISSION (WITV(TV)) Charleston, South Carolina	File No. BPET-800521KT
WCSC, INC. (WCSC-TV) Charleston, South Carolina	File No. BPCT-800521KU
CHARLESTON TV, INC. (WCBD-TV)[1] Charleston, South Carolina	File No. BPCT-800521KV
CLAY BROADCASTING CORPORATION (WWAY-TV) Wilmington, North Carolina	File No. BPCT-810813KB
For Construction Permits	

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 1984 Released: April 9, 1984

BY THE COMMISSION:

[1] Formerly State Telecasting Co., Inc.

1. The Commission has under consideration a petition for reconsideration filed September 25, 1983, pursuant to Section 1.106 of the Commission's Rules, by Eastern Carolinas Broadcasting Co. ("WPDE"), licensee of Station WPDE-TV, Florence, South Carolina; Capital Communications, Inc. ("WLXT"), licensee of Station WLTX(TV), Columbia, South Carolina; Columbia Television Broadcasters, Inc. ("WOLO"), licensee of Station WOLO-TV, Columbia, South Carolina; and Cosmos Broadcasting Corporation ("WIS"), licensee of WIS-TV, Columbia, South Carolina (hereinafter "petitioners" when referred to jointly); and related pleadings.[2] That pleading seeks reconsideration of the Commission's September 2, 1983, *Memorandum Opinion and Order* ("*Order*") affirming our previous actions granting the above-captioned applications. *First Charleston Corp,* FCC 83-386, released September 8, 1983.

2. *Background.* A detailed history of this matter is contained in the September 2, 1983, *Order.* Briefly, that order was occasioned by our separate grants of the Charleston and Wilmington applications to relocate their respective transmitter sites. In granting the Wilmington application, the Commission dismissed WPDE's motion to consolidate the Charleston and Wilmington applications to consider their cumulative impact on WPDE-TV. Appeals of the Commission's Charleston order were filed by WPDE and two Columbia, South Carolina, UHF television stations, WLTX and WOLO, in the United States Court of Appeals for the District of Columbia Circuit. *Capital Communications, Inc. v. F.C.C.,* No. 82-1730 (D.C. Cir. May 5, 1983) ("*Capital Communications*"). WPDE also filed an appeal of the Commission's Wilmington order in the same court. *Eastern Carolinas Broadcasting Co. v. F.C.C.,* No. 82-1749 (D.C. Cir. May 5, 1983) ("*Eastern Carolinas*"). In its appeals, WPDE argued, *inter alia,* that the Commission's failure to consider the cumulative impact on WPDE-TV of the grants of both the Charleston and Wilmington applications required reversal of the orders in both proceedings. In *Capital Communications,* the Court considered the various appeals of the Commission's Charleston action and affirmed the Commission's order insofar as the Columbia, South Carolina, stations were concerned. However, the Court found that the Commission's consideration of WPDE's cumulative impact allegations was inadequate and conclusory. The Court reversed the Commission's Charleston action with respect to WPDE; directed that the Charleston and Wilmington proceedings be

[2] A joint opposition to the petition for reconsideration was filed on behalf of the Charleston, South Carolina, applicants: First Charleston Corp. (WCIV(TV)); South Carolina Educational Television Commission (WITV(TV)); WCSC, Inc. (WCSC-TV); and Charleston TV, Inc. (WCBD-TV). Clay Broadcasting Corporation, licensee of WWAY-TV, Wilmington, North Carolina, also filed an opposition pleading. The petitioners filed a joint reply to the oppositions to the petition for reconsideration.

consolidated; and remanded the matter for an explanation from the Commission of the reasons supporting any ruling on WPDE's cumulative impact claims. In *Eastern Carolinas,* the Court reversed and remanded the Wilmington proceeding for the reasons stated in the memorandum accompanying the judgment in *Capital Communications.*

3. On June 16, 1983, WPDE, along with the three Columbia, South Carolina, licensees who participated in the Charleston proceeding, filed a "Notification of Intent to Supplement the Record on Remand." On June 20, 1983, WPDE, individually, filed a "Request for Interlocutory Relief" seeking the reduction of the effective radiated power of WWAY-TV, Wilmington, pending the Commission's resolution of this matter on remand.

4. In the September 2, 1983, *Order,* the petitioners were informed that the "Notification" would not be considered.[3] We stated that the Court clearly limited its remand orders "for an explanation from the Commission of the reasons supporting any ruling on [WPDE's] cumulative impact claims." Further, we explained that Section 402(h) of the Communications Act of 1934, as amended, limited our consideration to the narrow issue specified by the Court on the existing record. Therefore, the petitioners were told that they would not be permitted to reopen the record. Moreover, we found no basis for granting WPDE's request to order WWAY-TV to reduce its effective radiated power. We explained that WPDE had previously sought, but did not obtain, a stay of our action granting the WWAY application from us and the Court. WWAY-TV's improved operation was known to the Court when it considered the appeals from our decisions and nothing in its judgments required, or even suggested, that WWAY-TV should reduce its operating power. Thus, WPDE's request was denied.

5. In accordance with the Court's order to explain the reasons supporting our ruling on WPDE's cumulative impact allegations, we first rejected WPDE's claim that the specific adverse consequences to the public were conclusively determined in *South Carolina Educational Television Commission,* 39 FCC 2d 180 (Rev. Bd. 1973), *review denied,* FCC 73-508, released May 16, 1973, *appeal dismissed,* No. 73-1679 (D.C. Cir. December 31, 1975). In that case, the Commission denied applications filed in 1968 by the Charleston stations for authority to construct a joint common tower based on the finding that UHF development would be hampered in Florence. We explained that the former proposals were

[3] We also explained that because the Court affirmed our action with respect to the Columbia stations, we found that those licensees did not have standing to further participate in the remand proceeding involving only WPDE. However, because the Columbia stations filed their pleadings jointly with WPDE, their arguments were also considered.

different from those now under consideration and, further, UHF television generally and the Florence market in particular had significantly changed since that 1973 decision which now led to a different conclusion.

6. We next examined WPDE's allegations in order to determine the cumulative effect of the grant of Charleston and Wilmington applications upon WPDE-TV. Though WPDE maintained that its audience and revenues would be reduced, we found those losses to be speculative and insufficient to establish a nexus between the fact of extended VHF service and specific adverse consequences to the public beyond the impact on WPDE individually. We stated that while some audience loss may occur, WPDE offered no basis for its assumption that the station would automatically lose all viewers in areas overlapped by the Charleston and Wilmington stations or that audience reductions would result in the loss of the station's ABC network affiliation. WPDE's revenue loss estimates were found to be similarly speculative and unpersuasive. With only a bare unsupported assertion, WPDE translated its speculative audience loss estimate into a corresponding loss of revenues. No attempt was made to distinguish between the projected losses of revenues from the sale of advertising time and those derived from the sale of station time to the network. WPDE offered no support for its contention that the station could only survive by reducing programming as opposed to administrative, operating or other expenses. In short, WPDE offered no financial data, other than its projection that the station would produce a positive cash flow in 1982, which would permit an accurate gauge of its financial position. Thus, we found that WPDE presented no basis requiring these applications to be designated for hearing.

7. *The Petition for Reconsideration.* In the instant pleading, the petitioners contend that: (a) the Commission's denial of WPDE's request for interlocutory relief is without a reasoned basis and is arbitrary and capricious;[4] (b) the Commission erred in finding that the Columbia stations lacked standing to participate in the remand proceedings; (c) the Commission was arbitrary and capricious in denying the petitioners the opportunity to supplement the record; and (d) the conclusions reached in the Commission's September 2, 1983, *Order* are unsupported by the record evidence. Thus, the petitioners urge that the Commission's action should be reversed and remanded to the Mass Media Bureau for consideration of the supplemental showing and the necessity for an evidentiary hearing.

8. With regard to the denial of its request for interlocutory relief seeking the reduction of the operating power of WWAY-TV, WPDE claims that no reasoned explanation was offered. Further, WPDE states that the Commission's assertion that nothing in the Court's judgments

[4] Though the petition for reconsideration was filed jointly by the petitioners, this argument is raised by WPDE individually.

require or suggest that WWAY-TV reduce its operating power is an arbitrary and capricious finding. As to the standing of the Columbia stations, insofar as those stations participated in earlier proceedings relative to the Charleston applicants' former and present proposals, the petitioners maintain that the Commission erred in holding that they lacked standing to participate in the proceedings on remand.

9. The petitioners allege that the Commission's refusal to consider the supplemental showing arbitrarily and capriciously denied them the opportunity to address the cumulative impact issue. They maintain that the Court's judgments were broad in scope, affording the Commission the authority to hold a hearing if it so chose, thus providing the opportunity to reopen or supplement the record. The petitioners claim that the Commission's interpretation of Section 402(h) of the Act, whereby it was stated that the Commission was required to rely on the existing record in fulfilling the Court's order on remand, contravenes existing precedent and policy. It is alleged that the supplemental pleading contains the petitioner's comments not previously presented on the evidence in the existing record, as well as arguments based on the consolidated statistics and information previously advanced in these proceedings. Such a combined presentation, it is argued, has not been previously made to the Commission. It is also stated that the supplement addresses the impact of WWAY-TV's operation from its new facility. It is argued that this development occurred "because WWAY chose to proceed to construct the new facility, at its own risk and despite the Court appeal and ultimate reversal." Finally, the petitioners conclude that because the parties were not permitted to present the supplemental cumulative impact showing, the record lacks any basis for the conclusions reached by the Commission in the September 2, 1983, *Order.*

10. The petition for reconsideration is opposed by separate pleadings filed on behalf of the Charleston applicants jointly and WWAY-TV. They principally contend that the Commission properly fulfilled the Court's remand order and offered a reasoned explanation for its decision. The Charleston applicants further argue that even if the petitioners' supplemental pleading were considered, that showing does not undermine the Commission's conclusions. The petitioners' reply pleading, in addition to reiterating its previously raised arguments, addresses what it terms the Charleston stations' "misstatements" concerning the supplemental pleading.[5]

[5] Because Section 402(h) of the Communications Act limits us to the existing record on remand, the supplemental pleading was not considered in the September 2, 1983, *Order.* In our decision today, we conclude that the action was correct. See paragraph 12, *infra.* Therefore, we decline to address the arguments made with regard to the substance of the supplemental pleading.

11. *Discussion.* In fulfilling the Court's order on remand, the Commission was charged with the responsibility of explaining the reasons supporting the ruling on WPDE's cumulative impact claims.[6] The Court stated that if, "in the course of its deliberations, the Commission discovers that it is unable to offer a satisfactory justification for its finding of no cumulative impact or to make a reasoned finding concerning where the public interest lies in this case, it should order a hearing on the UHF impact issue." *Capital Communications, supra* at p.5. Despite the petitioners' assertions to the contrary, the Court did not require that a hearing be conducted in the first instance or state that all parties must return to the status quo in order for the Commission to comply with the Court's mandate on remand.[7] Clearly, had there been no support for our previous action, a hearing would then have been required and at that time the petitioners' supplemental pleading as well as WPDE's request for interlocutory relief would have been appropriately considered.[8] However, because the September 2, 1983, *Order* explained the reasons for our ruling on on WPDE's cumulative impact claims, there was no basis to go beyond the Court's remand order or the existing record.

12. Absent a direction by the Court to do otherwise, Section 402(h) of the Act requires the Commission to proceed on remand "upon the basis of the proceedings already had and the record upon which said appeal was had and determined." We disagree that that application of §402(h) in this case contravenes existing precedent and policy. In that regard, the cases

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[6] In the memorandum accompanying its judgment, the Court clearly limited its remand order for an explanation for the reasons for the action on WPDE's cumulative impact allegations. Our prior action with respect the Columbia stations was expressly affirmed by the Court. *Capital Communications, supra* at p.2. Because that action was affirmed, we found that those stations did not have standing the participate in the proceedings on remand. In any event, because the Columbia stations filed their pleadings on remand jointly with WPDE, those stations have in no way been prejudiced by our finding of their lack of standing as their arguments were nevertheless considered and addressed in the September 2, 1983, *Order.*

[7] The petitioners have also set forth portions of the transcript of the oral arguments before the Court in support of their contention that a hearing was contemplated. In fulfilling the order of the Court on remand, the commission is obligated to follow the Court's decision as set forth in the memorandum accompanying its judgment, not exchanges between advocates that took place during oral arguments.

[8] As explained in the September 2, 1983, *Order,* our action that day on the Court's limited remand order made unnecessary WPDE's request for interlocutory relief which was sought until the Commission resolved the matter. Thus, we reject WPDE's assertion that no reasoned explanation exists for the denial of its request. Moreover, both the Commission and the Court had previously rejected WPDE's efforts to stay construction of WWAY-TV's improved facilities. Those facts were known to the Court when it issued its judgements. It was not arbitrary and capricious under those circumstances to note that nothing in the Court's judgments suggested that WWAY-TV reduce its operation in order for the Commission to comply with the remand order.

relied upon by the petitioner are inapplicable. In *Meadville Master Antenna, Inc.*, 36 FCC 2d 591 (1972), the Commission ordered an evidentiary hearing despite the fact that no such direction was specified in the remand order. However, that case differs from the one at hand in several material respects. Most significantly, the *Meadville* case arose from an appeal, pursued under the provisions of Section 402(a),[9] which sets forth specific appellate procedures. See 28 U.S.C. §2347. As noted by the petitioners here, Section 402(h) was found to be inapplicable to the *Meadville* case because that section of the Act "relates only to appeals . . . from decisions and orders of the Commission in certain specified types of cases under Section 402(b) of the Act."[10] Further, the facts contained in the existing record in *Meadville* were found inadequate to resolve the issues then on remand to the Commission. Unlike the situation now before us, those issues could not be resolved on the existing record without a hearing. Under those circumstances, the Commission had the discretion to conduct an evidentiary hearing or to otherwise prescribe such procedures necessary to comply with the remand order. *Meadville, supra* at 593. See also, *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940). Additionally, the petitioners' reliance on *Fleming v. F.C.C.*, 225 F.2d 523 (1955) is similarly misplaced.[11] There, the Court remanded the case to the Commission with express directions to reopen the record and to conduct proceedings consistent with its opinion. In the case now before us, however, the existing record was adequate to permit the Commission to comply with the Court's remand order. The petitioners' attempt to supplement the record in this manner would unfairly offer a second opportunity to present arguments that were found deficient and unpersuasive in the first instance.

13. The petitioners' claim that the refusal to consider the supplemental pleading denied them the opportunity to address the cumulative impact issue is not supported by the evidence in the existing record. In the earlier proceedings, consolidated statistics of the cumulative impact of these proposals were presented in engineering exhibits submitted by WPDE.

[9] Section 402(a) states that any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under the Act (except those appealable under subsection (b)) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code (28 U.S.C. §2341 *et seq.*, relating to judicial review of orders of federal agencies).

[10] Section 402(b)(6), under which *Capital Communications* and *Eastern Carolinas* were heard, specifies its own appellate procedure, providing that appeals may be taken to the United States Court of Appeals for the District of Columbia by any person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying a construction permit application.

[11] The petitioners also cite the decision in *Enterprise Co. v. F.C.C.*, 96 F.2d 554 (1938). However, that case was decided before the Communications Act was amended in 1952 to include the provisions of Section 402(h).

Those exhibits included analyses of WPDE-TV's Grade B service area and the unduplicated ABC network service within that service area as affected by both the existing and proposed operations of the Charleston and Wilmington stations. Thus, the petitioners' comments on the evidence in the present record, aside from Section 402(h) considerations,[12] are unnecessary to address the Court's concern that the Commission explain the reasons supporting the ruling on WPDE's cumulative impact claims. Moreover, because the September 2, 1983, *Order* fully set forth the reasons for our decision, as well as the ultimate public interest determinations supporting that decision, we disagree that the petitioners were arbitrarily and capriciously denied the opportunity to address the cumulative impact issue and that no reasoned explanation was offered for our decision.

14. For these reasons we conclude that the Commission's grant of these applications was consistent with the Court's remand order as well as our statutory duty to determine that the public interest, convenience and necessity would be served thereby. Accordingly, IT IS ORDERED, That, pursuant to Section 1.106(j) of the Commission's Rules, the petition for reconsideration filed by Eastern Carolinas Broadcasting Co., Capital Communications, Inc., Columbia Television Broadcasters, Inc. and Cosmos Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

[12] In this regard, we note that Section 402(h) is not a blanket prohibition on this Commission's ability to call for additional comments on the existing record in a manner consistent with the Court's remand order. Had such comments (in contrast to factual information) been necessary to the resolution of any aspect of this matter, a Commission request for additional submissions would have been appropriate and consistent with the Court's remand order. We did not find such comments necessary here. The evidence and legal arguments purportedly supporting WPDE's cumulative impact claim have long since been placed in the record. According to the Court, it was our failure to adequately address this claim which caused the remand. In our September 2, 1983, *Order*, we addressed the Court's concerns. To allow the petitioners to make additional arguments on the existing record at this time would offer them a second chance to do that which they could have done when their cumulative impact allegations were initially presented. This course would be neither fair to the applicants nor in the public interest. To the extent that they wish to introduce new facts and arguments, the appropriate course would have been for the petitioners to obtain leave of the Court to supplement the record by filing their pleading with the Commission. Therefore, the petitioners' unsolicited and unauthorized pleading was properly rejected by the Commission.

Channel Assignment
FM Stations, Classes A, B1, B, C2, C1 and C
Frequency Assignment
Protective Buffer Zone
Station Separation

Memorandum Opinion and Order adopted denying all petitions for reconsideration except one. Commission will provide a protective buffer zone of a 16 - kilometer (10 mile) radius in addition to the normal distance separation requirements, to existing Class C stations currently operating with antenna heights of less than 300 meters (984 feet) above average terrain for three year period commencing April 19, 1984.

—*FM B/c Assignments*
BC Docket No. 80-90

FCC 84-65

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments	BC Docket No. 80-90 RM-2587 RM 3226 RM-3367

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 1984; Released: March 13, 1984

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING AND ISSUING A STATEMENT; COMMISSIONER PATRICK NOT PARTICIPATING.

Introduction

1. The Commission has under consideration requests for reconsideration of its *Report and Order* in the above-entitled proceeding adopted May 26, 1983 (48 Fed. Reg. 29486; published June 27, 1983). That document made several changes to the FM allotment structure to increase the availability of FM stations. It would:

a) allow stations with Class A facilities to operate on the 60 Class B/C channels;

b) increase the number of station classes, from three to six;

c) require existing Class B and C stations to meet or exceed minimum facility requirements within three years or be reclassified based on their actual operating facilities; and

d) convert the technical FM rules to the metric system of units.

2. Interest in these rule changes, or more accurately, in the new stations represented by these changes, was so great that the Commission decided to postpone their effective date until it had acquired additional staff resources. It also opted to temporarily abandon the traditional "petition" method used to amend the FM Table of Allotments in Section 73.202(b) of the rules. Instead, it decided to make 684 new allotments on its own motion, in a so-called "omnibus" proceeding, using a list of communities compiled previously.[1]

3. The Commission received six petitions for reconsideration of its action. These were filed by Richard Culpepper. Barry Chaiken, the National Association of Broadcasters ("NAB"), Cox Communications Inc. ("Cox"), the National Radio Broadcasters Association ("NRBA"), and a group of FM station licensees ("Licensees").[2] Comments in response to these petitions were filed by the Association for Broadcast Engineering Standards, Inc. ("ABES"), NRBA, Atlantic Broadcasting Corporation ("Atlantic"), and Brown Broadcasting Service, Inc. ("Brown"). The Commission also received an application for review filed by Knott County Broadcasting Corporation ("Knott").

Discussion

4. Richard Culpepper urges the Commission to permit the filing of applications on a demand basis, without reference to a table of allotments or in the alternative, to accept petitions to amend the present table immediately rather than after the omnibus proceeding. We must deny both requests. This proceeding did not seek to modify the allotment procedure represented by the Table.[3] Furthermore, to accept individual

[1] The communities are to be selected from the station requirements list adopted by the Second Session of the Administrative Conference on AM Broadcasting in Region 2. See Appendix B, footnote 1 of the *Report and Order.*

[2] "Licensees" refers to the petition filed by Forward Communications Corporation, Group One Broadcasting Company, Guaranty Broadcasting Corporation, Infinity Broadcasting Corporation, Lake Huron Broadcasting Corporation, Park Broadcasting, Inc., Shamrock Broadcasting Company, Inc., Summit Radio Corporation, Tri-Cities Broadcasting Company, WAHR, Inc., and WKRG-TV Inc.

[3] In the *Notice of Proposed Rule Making* (45 Fed. Reg. 17602; March 19, 1980) at paragraph 8, the Commission stated that ". . .we have decided to focus our attention on those proposals dealing with changes within the present allocations framework." This thought was referenced in paragraph 7 of the *Report and Order:* "Central to the *Notice's*

petitions under the new rules would result in the submission of a flood of FM petitions, a strain of staff resources and creation of unmanageable backlogs. To avoid this situation, the *Report and Order* stated that the Commission would propose the initial allotments under the new rules and, through a winnowing process, reduce demand to a more manageable level. Mr. Culpepper does not indicate errors in the reasoning process that led to the adoption of this approach and we see no reason to abandon it.

5. Barry Chaiken and Culpepper request the inclusion of communities in which they are the licensees of daytime only AM stations in the new table of allotments. Similarly, Knott requests the allotment of Channel 297C2 to Hindman, Kentucky. Consistent with our attempt to manage workload, the Commission determined that we would not accept recommendations for communities to be included in the omnibus rule making. We continue to believe that the most orderly and expeditious method of handling the increased channel availability resulting from the *Report and Order* in this proceeding is the omnibus rule making in which proposals are initiated by the Commission with the opportunity for comments and counterproposals by the public. Petitioners have presented no facts or arguments to alter that determination. Moreover, with specific regard to daytime only AM stations, the omnibus rule making will consider the allotment of FM channels to communities with daytime only stations. Indeed, communities with daytime only stations comprise a significant portion of the station requirements list referred to in footnote 1, *supra.*

6. The remaining petitions argue for various protections for Class B and C stations from the reclassification provisions of the *Report and Order*. We therein noted that a significant number of Class B and C stations were operating with facilities that were substantially below those permitted by the rules. Nevertheless, the Commission's spacing requirements protected those stations to the same extent as a full facility licensee. The result of protecting all Class B and C stations at the maximum facility level was the preclusion of new, otherwise permissible services. We therefore determined that existing stations would be given three years from the effective date of the new rules within which to file an application for facilities which achieved certain minimum values for each class. Stations that failed to file such an application within the specified period would be reclassified to an appropriate class that more accurately approximated their actual facilities.

7. NRBA and NAB request that the Commission grandfather existing Class B and C stations rather than reclassify them. Brown supports this request. These parties state that existing stations have been providing reliable service outside their recognized contours for a number of years.

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proposals was the retention of the Table of Assignments framework. It did not propose to modify the allotment structure represented by the Table."

If the stations are unable to maintain their present classification, those listeners would be deprived of their services. If the Commission nonetheless wishes to pursue its reclassification goal, NAB and NRBA suggest several measures be taken to provide a greater opportunity for licensees to increase facilities.

8. These suggestions concern the time period allowed for upgrading facilities and the means of protecting existing stations from new allotments made during the omnibus proceeding. NAB and NRBA ask the Commission to provide more than three years in which to meet the new minimums. NAB (and Cox) suggest 10 years; NRBA suggests waivers of the period be liberally granted. NAB, along with Cox and Licensees, requests the adoption of a "more realistic" power and tower height minimum for Class C stations. Their proposed values are based on contentions regarding the amount of land necessary to construct a 300 meter tower and the scarcity of such large parcels in many urbanized areas. Finally, NRBA and NAB, along with Cox and Licensees, urge the Commission not to make interim FM allotments that might impair the ability of existing stations to upgrade. These parties propose a protective zone of a radius of 15 miles be provided Class B and Class C stations to enable them to have sufficient area within which to relocate if necessary to upgrade their facilities.[4] "Licensees" urge the Commission "not to reclassify any Class C stations operating below the minimum antenna height, which during the three year period indicates an intention to relocate, but is unreasonably denied access to a 'unique site' in its market for which minimum height could be achieved."

9. In adopting the reclassification requirement in the *Report and Order* we were aware of the fact that for a variety of reasons, many Class B and C FM stations operate with substantially lesser facilities than those permitted by our rules. The licensee's decision to do so may be based on many factors, including: the facilities necessary to serve the licensee's community; financial considerations; real estate availabilities; local zoning restrictions; or air hazard determinations by the Federal Aviation Administration. Whatever the cause, these stations have received the mileage protection granted to a full facility station of the same class, but that separation provided far greater protection than that required to protect the station's primary service contours as defined by the Commission. In this proceeding, we found that such protection also precludes the potential for new service in other communities. Thus, it was determined that after a

[4] On the other hand, Atlantic Broadcasting Corporation supports the Commission's decision to reclassify existing stations, and it cites instances in which existing FM stations would prefer to voluntarily reclassify themselves from Class C to Class C-1. Such reclassification would enable a licensee to change transmitter sites to locations where they feel they will be able to better serve the public interest.

grace period for upgrading, stations would be reclassified according to their actual facilities. A reclassified licensee would continue to receive adequate protection albeit from reduced separation standards, and new service would become possible. Nothing presented in reconsideration has caused us to depart from this basic premise. The grandfathering of existing Class B and C stations would merely preserve waste of valuable spectrum resources which could be used to provide much needed service at another community.

10. At the same time, it is not our intention to overly restrict a licensee's ability to improve its facilities during the three year grace period. We agree with the petitioners who suggest that allotments made during the interim period could limit a licensee's ability to upgrade. In this regard, the *Report and Order* indicated that new allotments would be made based upon the present location of existing stations. Thus, new allotments could confine existing stations to upgrading at their present sites. However, land availability, local zoning restrictions or FAA considerations could preclude an improvement of facilities at that location. Accordingly, we have concluded that a "buffer zone" should be provided to permit some additional freedom of movement for existing Class C stations currently operating with antenna heights above average terrain (HAAT) of less than 300 meters, seeking to upgrade their facilities within the three year period.[5] However, Class B stations - unlike Class C stations - are not restricted to any antenna height minimums. In order to avoid reclassification an existing Class B station now operating below minimum facilities would only have to increase its power to a minimum level required under the new rules for its class of station. This does not require any major tower construction or change in transmitter location. Accordingly, no "buffer zone" would be permitted to Class B stations.

11. The Commission's technical staff conducted a limited study to determine the effect of a buffer on 189 communities chosen from the needs list and located in the southeastern part of the United States.[6] With no buffer and using the distance separations adopted in the *Report and Order*, allotments could be made to 107 of those communities. The study then recomputed the communities with potential allotments after adding different buffers to the mileage protection for Class C stations.[7] The results of our studies are set forth in the following table.

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[5] The provided "buffer zone" does not give the existing Class C stations the right to short-space or increase the short-spacing with existing assignments. However, it would allow existing Class C stations to move freely within the confines of the "buffer zone" provided it is possible to do so.

[6] The first 200 communities in that region were selected for the study, but eleven of those were found to be repeats. Thus, the remaining 189 made up the study.

[7] The study added protection only to those Class C stations whose antenna heights were less than 300 meters and therefore subject to reclassification. Some additional preclusion

Buffer Zone (Miles)	*Estimated Maximum Area for Potential New Site (sq. mi.)*	*Communities With Potential Allotments*	*Percent Reduction (107 base)*
0	0	107	0%
5	78	89	17%
7	154	77	28%
10	314	73	32%
15	707	54	50%

12. We selected the southeast for our study because that section of the country provides one of the more fertile areas for new allotments under the criteria established in the *Report and Order*. However, this fact also led the staff to believe that the preclusion in the southeast, although significant for decision making purposes, may be substantially greater than the preclusive effect of a buffer zone on a nationwide basis. To test this hypothesis, the staff conducted further computer studies applying buffer zones of five, seven, ten and fifteen miles to a nationwide list of 1401 communities.[8] The results of that study are as follows:

Buffer Zone (Miles)	*Communities with Potential Allotments*	*Percent reduction (828 base)*
0	828	0%
5	759	8%
7	729	12%
10	686	17%
15	619	25%

13. Based on these findings, we cannot support an increase in the separation standards to yield the fifteen mile buffer sought by petitioners. That amount of protection would substantially vitiate many of the benefits to be derived from the *Report and Order*. Rather, we believe that a 16 kilometer (10-mile) buffer can provide for a reasonable "protected area" within which stations may select new sites and at the same time it restricts the potential numbers of new allotments less harshly. In any other context the Commission cannot envision a set of circumstances that could persuade it to temporarily foreclose the allotment of one third of the new channels in any particular region of the

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would result from protecting all Class C stations, including those operating with near maximum facilities.

[8] The 1401 communities studied represent those locations on the station requirements list which: have no local station; have only a daytime station; were indicated as requiring an additional minority owned station; and/or were indicated as requiring an additional public (noncommercial) station.

country, as noted in paragraph 11, *supra*. On a national basis we consider 17% temporary foreclosure of channels to be the maximum we permit. However, we fully intended to provide existing stations with the opportunity to increase their facilities within the three year period. We now recognize that existing licensees will have reduced flexibility as the three year period passes, and, as new allotments are made, the buffer zone could become the only area in which an existing licensee could relocate to upgrade its facilities. Short of grandfathering all Class C stations, which we do not feel is warranted, a buffer becomes an acceptable means of protecting existing service so that stations may improve their facilities.[9] We acknowledge the magnitude of the short-term "cost" of a 16 kilometer buffer. Yet we also recognize that its impact will be temporary. It will dissolve at the end of the up-grade period. It is therefore possible that communities precluded by it will be eligible for an allotment when it is eliminated and existing stations undergo appropriate reclassification.

14. To summarize, the Commission will provide a 16 kilometer buffer, in addition to the normal distance separation requirements, to existing Class C stations currently operating with an HAAT of less than 300 meters. In the event that a station decides to move to a new location within the specified period, the buffer zone will be dropped and the new site will no longer receive protection in excess of that provided by the distance separations. We shall provide the buffer only during the period designated for stations to pursue upgrading options and shall not extend it.[10]

15. With regard to the remaining requests for modifications in the reclassification procedure, we find no reason to change our conclusions. The filing of an application to modify facilities is a more appropriate event with which to "toll" the grace period than the filing of a letter of intent as suggested by petitioners. If a licensee is denied access to a "unique site" within that period, we have no basis to assume that it would ever have access to that site.[11] Similarly, the suggestion that the grace period be extended to 10 years would unreasonably delay the use of a valuable

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[9] Stations operating with larger facilities are more "efficient," from an engineering standpoint, than stations operating with inferior facilities. (See footnote 9 in the *Notice*). Thus, Class C licensees serve the public interest and their own when they improve their facilities. The Commission's interest in providing a buffer area for licensees recognizes the dual benefit obtained.

[10] As is clear from the foregoing discussion, the Commission intends to protect only Class C stations. Therefore the request of NRBA to protect existing Class A stations with a five mile buffer is denied. Petitioner did not support the request in any manner and we can find no basis to grant it.

[11] If the "unique site" is in the possession of another broadcaster, Section 73.239 of our rules would preclude unreasonable denial of access. Moreover, if the "unique site" becomes available after reclassification, it is possible that the station could seek reinstatement of its higher class at that time.

resource by either the existing station that upgrades or new station(s) that would be precluded by the extended grace period.

16. We also do not believe that any change is warranted in the power and antenna height minima for Class C stations. In establishing the intermediate Classes of stations (B1, C1 and C2) we sought to create a rational mix of potential stations with progressively increasing service areas and appropriate distance separation protections. Petitioners have failed to support their contention that their proposal is superior to the one adopted by the Commission.[12] In order to avoid reclassification a licensee would have 813 square kilometers in his/her buffer zone area to find a new site, construct a tower and upgrade to minimum facilities required under the new rules for its class of station. Additionally, no licensee would be required to downgrade existing facilities so present service would be relatively unaffected. Accordingly, modification of our class standards is not warranted.[13]

17. In its comments, ABES requests clarification of Section 73.211 of the Commission's Rules that governs the maxima and minima height above average terrain (HAAT), and power requirements, of existing Class B and C stations. It states that it believes the rules do not adequately define how existing stations will be classified after the three-year period passes. By way of explanation, stations may not operate with power in excess of the maxima stated in the rules but they may use antenna heights greater than the maxima if transmitter output power is reduced. Reductions are based upon the distance to a station's 1 mV/m contour (60 dBu). Existing stations with antenna heights in excess of those specified in Section 73.211 of the Commission's Rules will be classified or reclassified upon the same basis, *i.e.*, the distance to the 1 mV/m contour. The new rules simply state this requirement and the curves formerly contained in figure 3 of Section 73.333 have been deleted.

18. Several other matters have come to the Commission's attention that require discussion and clarification. A question has been raised concerning the use of beam tilt by FM stations and whether main lobe

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[12] WNVC, for example, proposed the construction of a guyed tower 335 meters (1100 feet) above ground on a 10.9 acre site. Due to FAA objections, the proposal was amended to a 213 meter (698 feet) tower. Thus, towers exceeding the Class C minimum can be erected on less than eleven acres.

[13] Similarly NAB expressed its concern that the new mileage separations will negatively affect the quality of FM stereophonic reception. In the *Report and Order* the Commission stated that protecting stereophonic transmissions (rather than monophonic) would significantly increase the distance by which stations must be separated and thereby substantially decrease the potential for new stations. Increased protection was rejected based on the need to provide for a sufficient number of necessary allotments and because stereophonic broadcast is considered to be an optional enhancement of a station's entertainment programming. No new information has been provided to warrant a re-examination of this issue. Accordingly, we shall not revisit the protection question.

power or maximum power in the horizontal plane will be used when stations are reclassified. Existing stations using beam tilt will be classified according to their HAAT and power in the main lobe. This is consistent with Commission requirements that a broadcast station employing a beam tilt can change its antenna by filing an application for license (FCC form 302), provided that the existing HAAT and ERP remain unchanged. The Commission's FM engineering data base, which will be used for reclassification, does contain the main lobe power as well as power in the horizontal plane. Therefore we anticipate no difficulty in classifying or reclassifying existing stations. Nonetheless, if a station feels it has been incorrectly classified it should notify the Commission.

19. In other areas, questions have been raised about the applicability of Section 73.213 of the Commission's Rules to short-spaced stations. This rule section only applies to stations that were short-spaced prior to November 16, 1964. Other existing stations that do not meet the *increased* second and third adjacent channel spacings will be grandfathered at their existing sites. If they request a new site, our policy will be to waive the second and third adjacent channel separations to the "old" required spacings (*e.g.* 15, 40 or 65 miles for the duration of the three year period). Applications for unoccupied allotments, however, will have to meet the new spacing requirements.

20. Also, inquiries have been received from existing Class C stations wishing to voluntarily reclassify their stations to a lower class in order to move their transmitter site to a location that would not be available with their present station class. The Commission believes that these stations should not be required to go through rule making if they will voluntarily accept the lower classification. Therefore when a license is granted to such licensees, the Table will automatically be revised to the appropriate class of station.

Miscellaneous matters remaining from the "80-90" Report and Order

21. As indicated in the *Report and Order*, we shall convert the technical FM broadcast service rules to the International System of Units to conform to the Commission's program for conversion of all its rules. (See Public Notice, FCC 73-737, July 28, 1976.) Until such time as the application form can be revised to reflect this change, applicants may continue to tender applications that use the English system of units. The Commission's technical staff will convert the data on the application to the metric system to ensure compliance with the rules.

22. As note in paragraph 2, *supra*, the Commission did not set a date for the rules adopted in the *Report and Order* to be effective. It instead chose to delay the implementation of the new rules until it had sufficient staff resources to handle the number of petitions and applications

anticipated. Those resources have been obtained in the interim and the Commission will now set the effective date of the "80-90" rules to be the date of adoption of the omnibus "Notice."

23. One of the petitions that stimulated this proceeding was filed by the National Telecommunications Information Administration (RM-3367). It sought changes in the FM rules to allow "FM drop-ins," based on the use of terrain shielding and directional antennas. In the *Notice* in this proceeding the Commission indicated its intention to consider these requests in a future proceeding. We now believe that there is no reason to plan to examine the rule changes sought by NTIA within the forseeable future. A number of new stations will result from the other rule changes adopted that shall provide significant opportunities for new media outlets. We see no reason to pursue changes in the rules to allow still more stations before the potential afforded by the most recent changes are exhausted. We prefer to see if the present demand for new stations could perhaps be sated by the opportunities now available. Therefore we shall deny the NTIA petition without prejudice.

24. In the *Report and Order* we indicated that applications filed by existing Classes B and C stations requesting authority to increase antenna height and/or power in order to meet or exceed minimum facility requirements within the three year period, will be treated as minor changes. Similarly, we will consider as a minor modification any site move within the 16 Kilometers buffer zone area by an existing Class C station presently operating with an antenna height of less than 300 meters above average terrain, for the duration of the grace period. Furthermore, we indicated in the *Report and Order* that the maximum antenna height and power requirements for a Class C1 station (100 kilowatts and 300 meters HAAT) are also the established minimum requirements for a Class C station. To clarify this issue an existing station or a future proposal requesting 100 kilowatts of power and 300 meters of HAAT, will be treated as a Class C station. Section 73.211(b) is corrected to show that the maximum antenna height for Class C1 stations will be 299 meters (981 feet) to resolve any classification ambiguity.

25. Accordingly, IT IS ORDERED, that the "Petition for Partial Reconsideration" filed in this proceeding by Richard Culpepper, IS DENIED.

26. Accordingly, IT IS ORDERED, that the "Petition for Reconsideration" filed in this proceeding by Barry Chaiken, IS DENIED.

27. Accordingly, IT IS ORDERED, that the "Petition for Partial Reconsideration" filed in this proceeding by The National Radio Broadcasters Association, IS GRANTED IN PART AND DENIED IN PART.

28. Accordingly, IT IS ORDERED, that the "Petition for Partial Reconsideration" filed in this proceeding by the "Licensees" IS GRANTED IN PART AND DENIED IN PART.

29. Accordingly, IT IS ORDERED, that the "Petition for Partial Reconsideration" filed in this proceeding by "Cox," IS GRANTED IN PART AND DENIED IN PART.

30. Accordingly, IT IS ORDERED, that the "Petition for Reconsideration" filed in this proceeding by The National Association of Broadcasters, IS GRANTED IN PART AND DENIED IN PART.

31. Accordingly, IT IS ORDERED, that the "Application for Review" filed in this proceeding by Knott County Broadcasting Corporation, IS DENIED.

32. Accordingly, IT IS ORDERED, that the "Petition for Rule Making" filed by the National Telecommunications Information Administration, IS DENIED.

33. Accordingly, IT IS ORDERED, that Part 73 of the Commission's Rules, 47 C.F.R. 73 IS AMENDED, as set forth in the attached Appendix, effective April 19, 1984.

34. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

35. Authority for this action is contained in Sections 4(i), 303(g) and 303(r) of the Communications Act of 1834, as amended.

36. For further information on this proceeding, contact John Karousos, Mass Media Bureau, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

APPENDIX

1. Section 73.204 is added to read as follows:

§ 73.204 International agreements and other restrictions on use of channels. See §§ 73.207, 73.220 and 73.1650.

2. Section 73.207 is amended by revising Tables A and C to read as follows:

§ 73.207 Minimum distance separations between stations.

(a) ***

(b) ***

(1) ***

Table A
MINIMUM DISTANCE SEPARATION REQUIREMENTS
in kilometers (miles)

Table A
MINIMUM DISTANCE SEPARATION REQUIREMENTS
in kilometers (miles)

Relation	*Co-channel*	*200 kHz*	*400/600 kHz*	*10.6/10.8 MHz*
A to A	105 (65)	64 (40)	27 (17)	8 (5)
A to B1	138 (86)	88 (55)	48 (30)	16 (10)
A to B	163 (101)	105 (65)	69 (43)	16 (10)
A to C2	163 (101)	105 (65)	55 (34)	16 (10)
A to C1	196 (122)	129 (80)	74 (46)	32 (20)
A to C	222 (138)	169 (105)	105 (65)	32 (20)
B1 to B1	175 (109)	114 (71)	50 (31)	24 (15)
B1 to B	211 (131)	145 (90)	71 (44)	24 (15)
B1 to C2	200 (124)	134 (83)	56 (35)	24 (15)
B1 to C1	233 (145)	161 (100)	77 (48)	40 (25)
B1 to C	259 (161)	193 (120)	105 (65)	40 (25)
B to B	241 (105)	169 (105)	74 (46)	24 (15)
B to C2	241 (150))	169 (105)	74 (46)	24 (15)
B to C1	270 (168)	195 (121)	79 (49)	40 (25)
B to C	274 (170)	217 (135)	105 (65)	40 (25)
C2 to C2	190 (118)	130 (81)	58 (36)	24 (15)
C2 to C1	224 (139)	158 (98)	79 (49)	40 (25)
C2 to C	249 (155)	188 (117)	105 (65)	40 (25)
C1 to C1	245 (152)	177 (110)	82 (51)	48 (30)
C1 to C	270 (168)	209 (130)	105 (65)	48 (30)
C to C	290 (180)	241 (150)	105 (65)	48 (30)

(2)(i)
(3)

Table C
MINIMUM DISTANCE SEPARATION REQUIREMENTS
in kilometers (miles)

Relation	*Co-channel*	*200 kHz*	*400/600 kHz*	*10.6/10.8 MHz*
A to A	105 (65)	65 (40)	25 (15)	8 (5)
A to B	175 (110)	105 (65)	65 (40)	16 (10)
A to C	210 (130)	170 (105)	105 (65)	32 (20)
A to D	95 (60)	50 (30)	25 (15)	8 (5)
B to B	240 (150)	170 (105)	65 (40)	25 (15)
B to C	270 (170)	215 (135)	105 (65)	40 (25)
B to D	170 (105)	95 (60)	65 (40)	16 (10)
C to C	290 (180)	240 (150)	105 (65)	48 (30)
C to D	200 (125)	155 (95)	105 (65)	25 (15)
D to D	18 (11)	10 (6)	5 (3)	3 (2)

3. Section 73.506 is amended by revising the headnote and paragraphs (a)(3) and (b), to read as follows:

§ 73.506 Classes of Noncommercial Educational FM stations and channels.

* * * * *

(3) Noncommercial educational stations with more than 0.01 kW transmitter power output are classified Class A, B1, B, C2, C1, or C, depending on the effective radiated power, antenna height above terrain, and the zone in which the station's transmitter is located, on the same basis as provided for in §§ 73.205, 73.206, and 73.211 for stations on the non-reserved FM channels.

(b) Any noncommercial educational station except Class D may be assigned to any of the channels listed in § 73.501. Class D noncommercial educational FM stations applied for or authorized prior to June 1, 1980, may continue to operate on their authorized channels subject to the provisions of § 73.512.

4. Section 73.507 is amended by revising paragraph (c) to read as follows:

§ 73.507 Minimum distance separation between stations.

* * * * *

(c) (1) Stations separated in frequency by 10.6 or 10.8 MHz (53 or 54 channels) from allotments or assignments on non-reserved channels will not be authorized unless they conform to the separations in Table A given in §93.207.

(2) Under the United States-Mexican FM Broadcasting Agreement, for stations and assignments differing in frequency by 10.6 to 10.8 MHz (53 or 54 channels), U.S. noncommercial educational FM allotments and assignments must meet the separations given in Table C of § 73.207 to Mexican allotments or assignments in the border area.

5. Section 73.211 is amended by substituting the values "299 (981)" for the values "300 (984)" given as entry five in the third column of the table in paragraph (b).

6. Also footnote 36 of the *Report and Order* should change to read as follows:

Meters	=	.3048	x feet
kilometers	=	1.609	x miles
Square kilometers	=	1/.386	x square miles

CONCURRING STATEMENT OF FCC COMMISSIONER JAMES H. QUELLO

In re: Reconsideration of the Report & Order Modifying FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, BC Docket No. 80-90.

While this is not the course I would have chosen,[1] it does appear that

[1] *See* Dissenting Statement of Commissioner James H. Quello, *Report & Order* in *BC Docket 80-90*, 48 Fed. Reg. 29486, June 27, 1983.

significantly increased opportunities for local FM service may result from this decision. Since the item does recognize legitimate concerns of existing FM licensees as they seek to conform to the new policies, I concur in the result.

Fee Refunds
Reconsideration, Petition for, Denial of

Petition for reconsideration of Managing Director's fee refund denial denied. Petitioner essentially reargues the points it previously made. —*Hocking Valley B/cing Corp.*

FCC 83-537

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In The Matter Of	
Request Of Hocking Valley Broadcasting Corporation For Refund Of Fees	Fee Refund Request No. 18/40/1/314368671/ WHOK

MEMORANDUM OPINION AND ORDER

Adopted: November 1, 1983; Released: November 17, 1983

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. The Commission has before it a Petition for Review of the action of the Managing Director denying a request for refund of fees filed by Hocking Valley Broadcasting Corporation. The fee in question is a grant fee paid in May 1972 pursuant to the Commission's grant of applications to assign the licenses of then WHOK and WHOK-FM, Lancaster, Ohio from Hocking Valley Broadcasting Corporation to WHOK, Inc. Pursuant to the Commission's fee refund program, the entire amount of the grant fee ($10,500) is refundable. *See* 71 F.C.C.2d 171 (1979). The Commission refunded the fee in question on July 28, 1980, to WHOK, Inc. Hocking Valley filed its request for the refund in January 1982.

2. In letters of September 15, 1982, November 5, 1982, and December 10, 1982, the Chief of the Commission's Financial Management Division and the Commission's Managing Director denied Hocking Valley's refund request. These actions were based on the Commission's staff's conclusion that in the legal documents by which the assignment of the stations had taken place, Hocking Valley had transferred to WHOK, Inc. any right to refund of the fees that might subsequently arise. Thus, the Commission had properly paid the refund to WHOK, Inc. The fact that Hocking Valley

had been the party that technically paid the fee was irrelevant under these circumstances. Moreover, the staff letters pointed out that Hocking Valley itself recognized that the fee payment it made to the Commission "came from the money paid by the purchaser (WHOK, Inc.)."

3. In its Petition for Review, Hocking Valley makes two related arguments: (1) the purchase agreement and other relevant papers did not specifically mention fee refunds, although it specifically mentioned other assets; (2) "(t)here never was a meeting of minds on the rights to fee refunds for the very simple reason that the rights . . . to receive refunds of license and grant fees . . . did not even come into existence until" December 1976. At the Commission's request, WHOK, Inc. submitted comments on the arguments made in Hocking Valley's petition. WHOK, Inc. specifically disagreed with Hocking Valley's interpretation and concluded that the parties to the agreement "correctly realized that certain future inchoate rights of action might accrue after signing their contract in 1971. Rather than trying to enumerate what every future contingency might be, they instead adopted standard language, interpreted uniformly by courts in such instances, to convey to WHOK all assets of the radio stations and to give WHOK a future right to enforce any such rights." We have also taken into account Hocking Valley's response to WHOK, Inc.'s comments.

4. The Purchase Agreement (para. 1(m)) between Hocking Valley and WHOK, Inc. conveyed to WHOK, Inc. all "assets used or useful in the operation of the STATION, except bank accounts and cash on hand." Additionally, the General Assignment and Bill of Sale (p.3) executed by Hocking Valley on May 1, 1972, assigns to WHOK, Inc. the right to "institute and prosecute in the name of Seller (Hocking Valley) or otherwise any and all proceedings at law, in equity, or otherwise, which WHOK, its successors or assigns, may deem proper to collect, assert, or enforce any claims, right, title, or debt with respect to (all assets used or useful in the operation of radio stations WHOK and WHOK-FM)." This language plainly is sufficiently broad to include the right to future fee refunds, particularly since there are no other terms in the agreements that contradict such a reading.[1]

[1] We find unpersuasive the argument, suggested for the first time in Hocking Valley's response to WHOK's comments, that there is some significance to the fact that the fee "was paid from the bank accounts or cash of the seller which were specifically excepted." In the first place, Hocking Valley has acknowledged that the fee payment it made to the Commission "came from the money paid by the purchaser (WHOK, Inc.)." Moreover, regardless of what account the fee was paid out of, the issue is what the contract provided in the case a refund is made. We agree with Hocking Valley that the "buyer received exactly what it paid for." However, in our view, what the buyer paid for in the circumstances of this agreement included the right to refund of fees. This decision is only

5. The assertion (Pet. for Rev. at 3) that "the right to fee refunds was not in existence at the time" that the parties entered into the purchase agreement is correct insofar as there was no final court decision explicitly requiring the Commission to pay refunds until 1976. However, there was ample reason for parties entering into negotiations for sale of a station that would incur a substantial fee to be on notice that there existed a potential for full or partial refund of that fee. At the time Hocking Valley and WHOK, Inc. entered into the purchase agreement, there was pending litigation challenging the Commission's fee schedule. And that litigation, begun in April 1971, led ultimately to the 1976 court decisions requiring that refunds be paid. Moreover, the Commission announced on three separate occasions, all of which predated the October 1971 purchase agreement between the parties, that it would maintain records to permit it to make any refunds that should be necessary. *See Schedule of Fees*, 24 F.C.C.2d 613 (1970); Schedule of Fees, 28 F.C.C.2d 139, 155 (1971); *Schedule of Fees*, 30 F.C.C.2d 769, 770 (1971).

6. In light of this background, the statement (Pet. for Rev. at 3) that "(t)here was no meeting of the minds of the parties" is irrelevant. A prudent person, who desired not to transfer a then inchoate right to a refund of fees, would not have agreed to a contract term that transferred "all assets used or useful in the operation of the station" without including some provision excluding from those assets rights to fee refunds. Whatever the subjective intent of the parties may have been in making the contract – or even if they had no intent with respect to fee refunds – the legally relevant consideration is the outward manifestation of intent, i.e., the terms of the contract.

7. Since the language "all assets used or useful in the operation of the station" is sufficiently broad to cover right to refunds, since there is no language in the contract excluding a right to refunds from the scope of the "used or useful" language, and since Hocking Valley had adequate notice that a refund of the fee in question was possible at some time in the future, the clear conclusion is that Hocking Valley transferred the right to receive fee refunds to WHOK, Inc. in 1971. Accordingly, the Petition for Review is denied.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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for the purpose of administering our fee refund program. We, of course, take no position on whether Hocking Valley may still have a cause of action under state law.

Comsat, as Common Carrier
Comsat, Carrier Participation
INTELSAT
Satellite Communications, International, Policy re

Report and Order adopted terminating Inquiry on proposals to permit the U.S. International Service Carriers (USISCs) to obtain "direct access" to INTELSAT space segment facilities. Orders retains current policy which provides that the U.S. Signatory to INTELSAT - the Communications Satellite Corporation (Comsat) - has exclusive U.S. ownership interests in the INTELSAT satellite system, and requires the USISCs to lease INTELSAT space segment facilities from Comsat pursuant to tariff.
—*INTELSAT Satellite Facilities*
CC Docket No. 82-548

FCC 84-129
34412

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers	CC Docket No. 82-548

REPORT AND ORDER

Adopted: March 30, 1984 Released: April 25, 1984

BY THE COMMISSION:

I. Introduction and Background

1. On August 5, 1982, we adopted a Notice of Inquiry regarding the possible modification of the current arrangements whereby the U.S. international service carriers (ISCs) acquire, through the Communications Satellite Corporation (Comsat), the satellite capacity of the International Telecommunications Satellite Organization (INTELSAT).[1] Specifically, we sought to determine whether carriers other than Comsat should be

[1] INTELSAT Satellite Facilities, 90 FCC 2d 1446 (1982) ("Notice" or "NOI.")

permitted to obtain so-called direct access[2] to INTELSAT in the form of capitalized leaseholds or investment interests in Comsat's share of INTELSAT space segment facilities.[3] As we discuss below, it has been argued by various parties to other Commission proceedings that modification of the INTELSAT access policy along these lines would enable the ISCs[4] to acquire space segment capacity from Comsat at a price commensurate with that which they would be charged were they to obtain such facilities directly from INTELSAT. Proponents believe that a new policy of direct access, coupled with the unbundling of Comsat's current combined space segment/earth station tariff[5] and a more flexible earth station ownership policy, would enhance competition in international satellite telecommunications. End-to-end service providers could choose to operate their own international earth stations and invest in Comsat's share of the space segment. The prospect of a return on their invested capital could create incentives for the carriers not only to increase their usage of the INTELSAT system but also to utilize the system more efficiently. Use of existing earth stations and acquisition of INTELSAT space segment capacity from Comsat under traditional lease arrangements would be within the discretion of the individual carrier, operating subject to marketplace forces.

2. Since the inception of the INTELSAT global satellite system, Comsat has served as the U.S. Signatory to INTELSAT, the sole U.S. investor in the system, and the monopoly supplier of INTELSAT space segment services to the ISCs. In turn, the ICSs, as end-to-end service providers, have utilized Comsat-provided space segment facilities, in conjunction with earth stations jointly owned by Comsat, AT&T and the traditional international record carriers (IRCs), to offer international satellite telecommunications services to the public. When we proposed to

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[2] As we stated in the NOI, the terms "cost-based," "direct economic," "equitable," and "equal" have been used interchangeably with "direct" to describe the type of access arrangements under discussion. 90 FCC 2d at 1447, n. 2. We chose the term "direct" access merely as a matter of convenience. Clearly, what is at issue here are the merits of the concept, not the term used to describe it.

[3] As of March 31, 1983, Comsat held a 24.36% investment share in the INTELSAT system. INTELSAT 10th Annual Report, April 1, 1982 - March 31, 1983, p. 7 ("INTELSAT 10th Annual Report").

[4] The ISCs are American Telephone and Telegraph Company, Graphnet Systems, Inc., Hawaiian Telephone Company, Satellite Business Systems, Inc., Western Union Telegraph Company and the traditional international record carriers (IRCs): FTC Communications, Inc., ITT World Communications Inc., RCA Global Communications, Inc., TRT Telecommunications Corporation and Western Union International, Inc.

[5] Pursuant to its current basic Tariff FCC NO. 101, Comsat's charge for a full-time voice-grade half-circuit is $1125 per month.

modify our *Authorized User*[6] policy to permit Comsat to offer service directly to non-carrier customers,[7] various parties urged that we also revise our policy on carrier access to INTELSAT space segment. These parties asserted that such revisions would be necessary to restore competitive balance in the market for international satellite telecommunications services were we to go forward with the new *Authorized User* policy. They claimed that direct access would minimize Comsat's ability to use its monopoly position in INTELSAT to engage in discriminatory space segment price-setting, cross-subsidization and other anticompetitive conduct, thereby placing the carriers and Comsat on equal footing, and producing public benefits of increased customer choice, expanded service offerings and reduced rates of service. They asserted that the issue of direct access was therefore a relevant factor to be considered by the Commission prior to implementing the revised *Authorized User* policy.[8]

3. Having reviewed the record in this proceeding, we conclude that proponents of direct access have failed to establish that it will serve the public interest. We are unpersuaded that, whatever benefits are to be derived, they would be so substantial as to outweigh the adverse consequences which are likely to attend the adoption and implementation of direct access. We are therefore rejecting the direct access proposals before us and terminating this proceeding. As to those concerns upon which proponents of direct access base their support, we shall consolidate into other ongoing Commission proceedings alternative measures to direct access which should substantially enhance the position of the end-user as well as Comsat's carrier customers.[9] However, we emphasize that in terminating the instant Inquiry we are not foreclosing our reconsideration of direct access should our alternative measures prove ineffectual.

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[6] Authorized Entities and Users, 4 FCC2d421 (1966), *reconsideration granted in part*, 6 FCC 2d 593 (1967).

[7] Aeronautical Radio, Inc., 77 FCC 2d 535 (1980) ("Authorized User NPRM"). We adopted these modifications on August 5, 1982. Authorized User Policy, 90 FCC 2d 1394 (1982) ("Authorized User II").

[8] The U.S. Court of Appeals, D.C. Circuit agreed. It vacated and remanded this decision on the grounds, *inter alia*, that we had abused our discretion by implementing the new policy prior to considering the merits of direct access. ITT World Communications Inc. v. FCC, No. 79-1046, slip op. at 43, 49, 51 (D.C. Cir. Jan. 13, 1984) ("Authorized User II Opinion"). On March 27, the Court of Appeals denied our petition for rehearing.

[9] *See* Second Memorandum Opinion and Order, CC Docket No. 80-634 ("Comsat Structure proceeding"), FCC 84-128 (adopted March 30, 1984; released April 20, 1984), and Notice of Proposed Rulemaking, CC Docket No. 82-548 ("Earth Station Ownership proceeding"), FCC 84-122 (adopted March 30, 1984; released April 20, 1984). *See also* the letter from the Chief, Common Carrier Bureau, to Lawrence M. DeVore, Vice President, Law and Administration, World Systems Division, Comsat, dated March 30, 1984, concerning the Commission's policy on public dissemination of INTELSAT/INMARSAT documents, technical data and inventions.

4. Below we outline the events which led us to initiate this proceeding, and summarize the Notice of Inquiry and the two direct access options set forth for comment there. Next we review the positions for and against direct access as presented in the comments and replies filed in response to the NOI. We then address the economic and policy issues raised by direct access. Finally, we explain our reasons for declining to establish a direct access policy at this time and for adopting alternative measures in lieu thereof.

A. The Notice of Inquiry

5. In August of 1982, the Commission initiated a series of actions dealing with our international telecommunications market. We adopted a Memorandum Opinion and Order in the *Comsat Structure* proceeding[10] affirming our prior *Comsat Study* determination[11] that Comsat may legally engage in non-INTELSAT/INMARSAT lines of business so long as such activities are not inconsistent with the purposes and objectives of, and Comsat's responsibilities under, the Satellite Act. In so doing, we authorized Comsat to participate in competitive and other activities via fully-separated subsidiaries. In a separate action, we proposed to eliminate certain restrictions which, under the existing *Authorized User* policy, had essentially limited Comsat's role to that of a "common carrier's common carrier."[12] We proposed to permit Comsat to offer end-to-end service to the public through a separate subsidiary and require Comsat to offer basic INTELSAT transmission capacity at U.S. general purpose earth stations to both carriers and non-carrier users pursuant to a single tariff to be filed with the Commission.[13]

6. Several parties, among them the National Telecommunications and Information Administration (NTIA), RCA Global Communications, Inc. (RCA) and Western Union International, Inc. (WUI), responded to the *Comsat Structure* and *Authorized User II* rulemaking proceedings, stating that to permit Comsat to serve the public directly, while allowing Comsat to retain its earth station and space segment monopolies, would place Comsat in an advantageous competitive position *vis a vis* the international service carriers. They argued that by reason of its statutorily-authorized ownership interest in the INTELSAT system, and its dominant position in the Earth Station Ownership Consortium (ESOC), Comsat virtually controlled the U.S. portion of the satellite communica-

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[10] Communications Satellite Corporation, 90 FCC 2d 1159 (1982) (hereafter "Structure Order"), *recon. denied*, In the Matter of the corporate structure and operations of the Communications Satellite Corporation, FCC 2d, FCC 83-121 (adopted March 31, 1983; released April 20, 1983).

[11] Communications Satellite Corporation, 77 FCC 2d 564, 610-619 (1980).

[12] *See* Authorized User NPRM, *supra* note 7, at 558-559.

[13] *Id.*

tions path. Such control enabled Comsat to extract excessive charges from its customers through its combined (bundled) earth station/space segment tariff. Were Comsat to retain control of the earth station segment and direct access to the INTELSAT space segment while providing service to users, these parties argued, Comsat would have economic incentives to maintain the present high level of its tariff rate. It would also be able to manipulate revenues obtained from its INTELSAT-related (jurisdictional) activities so that its competitive subsidiary could underprice end-to-end service offerings to the detriment of the other firms in the market. To safeguard against Comsat's alleged ability to engage in such conduct, these parties urged the Commission to authorize carriers other than Comsat to obtain investment-based interests in INTELSAT space segment and grant them the choice of providing their own earth stations, rather than being constrained to obtaining these facilities from Comsat.

7. *Direct Access Proposals.* The direct access NOI solicited comment on two alternative options. The first, characterized as "capital lease" Option 1 is based on a proposal previously submitted by RCA. Pursuant to this arrangement:

(a) Comsat would continue to make a capital investment in the INTELSAT system;

(b) Comsat would be required to "unbundle" its current basic Tariff FCC No. 101;

(c) the other international carriers would be permitted to lease from Comsat, on a cost-pass-through basis, the INTELSAT satellite facilities they actually use;[14]

(d) the leasing carriers would be required periodically to pay Comsat a ministerial fee to cover any administrative and maintenance costs incurred by Comsat in connection with the provision of the particular facilities leased to them; and

(e) the leasing carriers would be solely responsible for acquiring and separately paying for appropriate earth station access.

With respect to Option 1, we raised the question whether the carriers should be permitted to include the value of their leases in their respective rate bases, and if so, how to avoid the imposition upon the end-user of two returns – those of the carriers on their capitalized leases and Comsat's allowed return on its investment in the leased facilities.

8. The second direct access option set forth in the NOI is the so-called "IRU" option. The IRU option is based upon a capital investment concept proposed by NTIA in its comments to the *Authorized User II* rule-making.[15] An IRU, or indefeasible right of use, as employed by the ISCs in submarine cables, is a capital investment interest in a facility of which the IRU holder does not obtain rights in management or control. The holder

[14] The lease price would reflect only that amount Comsat pays to INTELSAT for these facilities.

[15] CC Docket NO. 80-170, NTIA Comments at 19 (August 12, 1980).

does, however, receive the other benefits normally associated with ownership. Like the capital lease option, Comsat would be required to unbundle its tariff under the IRU approach. Option 2 would permit the international carriers to:

(a) invest in the INTELSAT space segment by making an appropriate payment to Comsat for that portion of Comsat's share of the space segment which they use; and

(b) acquire and separately pay for appropriate earth station access.

In turn, the carriers would be required to:

(c) pay Comsat for Comsat's share of INTELSAT operating costs; and

(d) pay Comsat a pro-rata share of Comsat's own costs and the use of its corporate facilities for carrying out its U.S. Signatory functions and other duties under the Satellite Act.

9. In addition to soliciting comments on these two direct access options, the NOI invited interested parties to suggest alternative proposals. Further, parties who had previously filed comments in support of "cost-based" or "direct economic" access to INTELSAT space segment were asked to clearly define what they meant by those terms, and to distinguish such access from the access the carriers now have to INTELSAT's facilities. They were also asked to provide technical, financial and any other information which would enable the staff to thoroughly analyze the proclaimed benefits to be derived from such access.

B. Positions of the Parties

10. Comments to this proceeding were filed by: American Broadcasting Companies, Inc. (ABC), CBS, Inc. (CBS) and National Broadcasting Company, Inc. (NBC) jointly (the Networks); American Telephone and Telegraph Company (AT&T); the Central Committee on Telecommunications of the American Petroleum Institute (Central Committee); Communications Satellite Corporation (Comsat); Department of Justice (DOJ); Hawaiian Telephone Company (HTC); Home Box Office, Inc. (HBO); ITT World Communications Inc. (ITTWC); National Public Radio (NPR); RCA;[16] Spanish International Network (SIN); TRT Telecommunications

[16] Comments were due December 1, 1982. On December 17, RCA filed a motion to provide additional information on potential traffic diversion resulting from Comsat's ability to offer basic transmission service at general purpose earth stations to non-carrier users. We grant this motion because RCA's initial comments were timely filed, the additional information represented the most recent data in RCA's possession, the information is relevant to the financial issues raised by direct access, and the other parties to the proceeding had sufficient time to review and respond to the additional information in their reply comments.

Corporation (TRT);[17] WUI; and Western Union Telegraph Company (WU). Reply comments were filed by: American Satellite Company (ASC); Comsat; Department of Defense (DOD); DOJ; HTC; ITT; NPR; RCA; TRT TRT; and WUI.

11. The parties supporting some form of direct access are: ASC, the Central Committee, DOD, DOJ, HBO, HTC, ITT, the Networks, RCA, TRT, WUI and WU. Of these, the Central Committee, DOD, HBO, ITT, the Networks, WUI and WU would have the Commission adopt either or both of the direct access options set forth in the Notice, or any variations thereof which include the requirement that Comsat unbundle its combined tariff.[18] Typical of the views of these parties are those of the Networks and the Central Committee. In their Comments, the Networks state that:

> [I]f the international carriers were allowed some form of direct access to Intelsat space segment at cost-based rates, they should be able to compete effectively with Comsat for the business of end users. By direct access, we simply mean a form of access – by whatever name – which would allow the carriers to obtain Intelsat circuits at or near the same price that Comsat pays for these same facilities. Such cost-based access would allow the carriers and Comsat to compete on roughly the same basis for the provision of Intelsat space segment to end users.[19]

12. The Central Committee states that:

> . . . regardless of which option the Commission chooses the Central Committee strongly believes that the Commission should require Comsat to "unbundle" its current basic tariff. Without such unbundling, the Commission will have a difficult time determining whether or not Comsat is subsidizing its retail activities with profits derived from its space segment services. Separate charges for ground and space segment facilities is (sic) absolutely essential to a competitive marketplace.[20]

13. While the Central Committee supports both the lease and IRU options, it believes that the Commission can more easily implement the lease alternative because it seems to have fewer ramifications for the current operations of the INTELSAT consortium than does the IRU option. The Central Committee's views are shared by ASC, HTC, and RCA. For its part, RCA not only embraces Option 1 but offers for

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[17] Due to administrative problems, TRT filed its initial comments one day late. We are accepting TRT's filing because it has not prejudiced the other parties to this proceeding.

[18] In its reply comments, DOD argues that the Commission should allow the carriers and other authorized users and entities, including the U.S. Government, to select for themselves the type of direct access arrangements they would prefer. DOD Reply at 4-6.

[19] Networks' Comments at 6. We note that their description of direct access is generally accepted among those advocating its implementation. For example, ASC defines direct access as "the ability of a carrier authorized to provide international service to obtain INTELSAT space segment from Comsat at a price that is reasonably related to Comsat's costs for the facilities and for making those facilities available to the carrier." ASC Reply at 2. We also note that the Department of Defense and the Networks believe the Commission should also consider the question of non-carrier direct access to INTELSAT space segment. Networks' Comments at 2; DOD Reply at 6.

[20] Central Committee Comments at 5.

consideration two additional alternatives: straight (*i.e.*, non-capitalized) long-term and short-term leases.[21] Both are similar to Option 1 in that they would require Comsat to unbundle its combined tariff; permit the carriers to lease INTELSAT space segment from Comsat on either a long or short-term basis and at a price which would be based upon the INTELSAT Utilization Change (IUC) of $390 per voice-grade channel per month;[22] and require the carriers to periodically reimburse Comsat for any coordination and maintenance costs incurred in making available to them the INTELSAT facilities they require. Unlike Option 1, however, both of RCA's lease proposals would permit Comsat to retain its total investment in INTELSAT space segment. As neither proposal would involve rate base treatment of the value of the leases, the prospective "double rate base" problem raised in the NOI would be avoided. For this reason, ASC finds RCA's alternative proposals particularly attractive.[23]

14. The United States Department of Justice also supports direct access as a vehicle for enhancing competition in the international satellite telecommunications market. However, DOJ prefers that the Commission require Comsat to make INTELSAT space segment available to the ISCs on an IRU basis (Option 2). DOJ states that as the executive agency responsible for enforcing the antitrust laws and promoting competition, it believes that direct access would diminish any ability Comsat might have to exploit its position in INTELSAT to impede competition from the international carriers. DOJ asserts that the ISCs should be required to assume some of the risk of investing in INTELSAT by infusing their capital into space segment facilities. In DOJ's view, the IRU direct access option would put all competitors on a more equal footing because their investment in INTELSAT would provide incentives for the carriers to fully utilize the system. As a consequence, carriers and users would be better able to choose between modes of transmission on the basis of economic or technical efficiency rather than regulatory requirements. To this end, DOJ posits that the Commission should also eliminate its composite-rate policy and prescribed-use formulas.[24]

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[21] RCA Comments at 34-5; Appendix 2 (December 1, 1982).

[22] Since 1981, INTELSAT's utilization charge for a telephone circuit has been US $9,360 per annum. *See* INTELSAT 10th Annual Report, *supra* note 3, at 28. Therefore its utilization charge for a full-time voice-grade half-circuit is $390 per month. As the issue of the appropriateness of the IUC as the price upon which Comsat should base its space segment charge lies at the heart of the direct access controversy, we shall not attempt to explain the concept at this juncture. A full description and analysis is provided below at paragraphs 33-48.

[23] ASC Reply at 4.

[24] DOJ Comments at 14-15. The Commission's composite-rate policy requires the ISCs to base the prices they charge their customers on the combined average costs of providing service over both satellite and submarine cable facilities, rather than charging separate prices to customers serviced by satellite and those served by cable. The Commission's

15. DOJ also echoes the sentiments of NTIA. In its comments in the *Authorized User II* rulemaking and in a letter submitted in this proceeding, NTIA expresses a preference for the capital investment (IRU) approach to direct access because, to the extent that Comsat's competitors would each have some investment in the INTELSAT system, and therefore some incentive to use it, the IRU approach would put all competitors on more or less equal footing with Comsat. Moreover, NTIA believes that Comsat, as U.S. Signatory to INTELSAT and largest user of INTELSAT space segment, must perform many functions that require capital investments and operating costs. NTIA and DOJ believe the IRU option would enable Comsat to earn a return on its investment and be reimbursed for the costs of performing these requisite functions.[25]

16. For the most part, TRT and WUI support the positions of DOJ and NTIA on IRUs, although WUI suggests that since it does not erect a capital investment barrier to market entry, the direct access lease option may prove more attractive to new carrier entrants.[26] DOJ qualifies its support for the IRU option in a different manner. It suggests that the IRU option be applied prospectively, that is, to new investments in INTELSAT. In DOJ's opinion it would be neither practical nor equitable to require that ownership interests in current INTELSAT facilities be transferred to the USISCs.[27]

17. Of the remaining parties commenting in this proceeding NPR reserves judgment on direct access and, as discussed below, AT&T, Comsat and SIN are negatively disposed toward the concept.

18. *Proponents.* The principal argument advanced by the parties supporting direct access is that it would be essential to restoring competitive balance in the international satellite market were we to revise *Authorized User* along the lines we proposed. They contend that since *Authorized User II* would require Comsat to offer basic transmission capacity to the public at the U.S. general purpose earth stations, and authorize Comsat to offer end-to-end service to the public through corporate subsidiaries, the Corporation would have the ability to exploit its Signatory status in INTELSAT to its competitive advantage. The premise underlying this contention is that Comsat and the vast majority of the other international telecommunications entities in the world currently acquire units of space segment from INTELSAT at the IUC rate of $390

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prescribed-use formulas were established to require the USISCs to activate satellite circuits in set proportions to the number of cable circuits activated. *ITT World Communications Inc. v. FCC, supra,* note 8, at 1424.

[25] DOJ Comments at 15; NTIA Comments in CC Docket No. 80-170 at 18 (August 12, 1980). *See also,* letter from Richard H. Shay, Chief Counsel, NTIA, to Gary M. Epstein, Chief, Common Carrier Bureau, August 31, 1982.

[26] WUI Comments at 46-47.

[27] DOJ Reply at 3.

per month per full-time voice-grade half-circuit. Yet, because Comsat has chosen to provide these half-circuits under a combined or "bundled" space segment/earth station tariff, the carriers are forced to acquire such facilities at a rate of $1125 per month. The parties supporting direct access complain that as a result of *Authorized User II* and Comsat's position as sole provider of INTELSAT space segment, Comsat would be able to: (1) extract payments for INTELSAT space segment far in excess of the costs properly allocable to Comsat's provision of the facilities; and (2) offer customers "space-segment only" facilities at the U.S. general purpose earth stations at rates with which the carriers could not compete without suffering operating losses. Such losses would occur because the new *Authorized User* policy would enable Comsat to offer basic transmission capacity to carrier and noncarrier customers alike at the same tariff rate. Consequently, noncarriers would have little incentive to continue to obtain leased channels from the carriers because the price charged by the latter would necessarily include a profit component. Rather, non-carriers would probably prefer to obtain basic transmission capacity from Comsat and make their own arrangements for interconnection of their leased channels.[28]

19. For the most part, proponents of direct access believe the INTELSAT utilization charge, or IUC, to be the appropriate yardstick for determining the price carriers should be required to pay for INTELSAT space segment.[29] They argue that the IUC is based upon INTELSAT's estimate of its annual revenue requirement per unit of space segment. They cite the *Comsat Study*, in which we stated that the revenues generated by INTELSAT's utilization charges are used to meet the following obligations in order of priority: (1) the maintenance and administrative costs of INTELSAT, (2) operating funds which the Board of Governors deems necessary, (3) depreciation and (4) a 14 percent pre-tax return to Signatories for use of their capital.[30] Based upon this information, the proponents assert that even were the carriers to pay Comsat no more than the IUC of $390 per circuit per month, Comsat would still receive an appropriate return on its INTELSAT investment.

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[28] RCA projects that as a result of this aspect of *Authorized User II*, RCA stands to lose 69.7% of all private line channels (33 of 66 cable channels, all 43 satellite channels) it currently leases to DOD. RCA also projects total lost revenues for leased channels and associated equipment of $1,292,300 and $201,600 per month respectively. RCA Comments, Revised Appendix 1, pp. 7-12. We note here that essentially the same allegations for adverse impact were made to the U.S. Court of Appeals for the D.C. Circuit in *ITT World Communications Inc. v. FCC, supra* note 8.

[29] HTC Comments at 16; RCA Comments at 23, 30; DOD Reply at 8; ITT Reply at 4; TRT Reply at 10-12.

[30] *Comsat Study, supra* note 12, at Appendix D (p. 789).

20. In support of their claim that the IUC accurately reflects the cost of a unit of INTELSAT space segment, the advocates of direct access state that the Soviet Union and other entities which are not members of INTELSAT are able to obtain space segment capacity directly from INTELSAT at the IUC rate of $390 per month per half-circuit.[31] They therefore find no economic justification for the sizable differential between the amount non-members pay for space segment and the amount Comsat charges the international carriers to acquire and utilize identical facilities.

21. Most of those who support direct access acknowledge that Comsat must be compensated for costs incurred in securing space segment from INTELSAT, as well as for various administrative, operations and maintenance and other costs associated with activities in which Comsat engages in fulfillment of its responsibilities under the Satellite Act. Thus, under direct access, they claim the carriers would be willing to pay Comsat the following: (1) the IUC, (2) any administrative costs directly related to Comsat's provision of space segment capacity and (3) Comsat's Commission-prescribed rate of return of 11.48-12.48 percent. The latter rate would include any net return earned by Comsat on its INTELSAT capital investment based on the total annual circuits actually used.[32] The proponents of direct access believe that the price represented by these three components would be well below that which Comsat currently attributes to the space segment portion of its combined tariff. They therefore maintain that as a matter of policy the Commission should adopt direct access to prevent Comsat from continuing to extract from the international carriers any payments in excess of the above costs.

22. Finally, parties supporting direct access assert that it is legal and appropriate under the INTELSAT Agreements and consistent with the purposes and objectives of the Satellite Act. With respect to the former, they assert that INTELSAT is indifferent as to the financial arrangements developed between a Signatory and domestic entities authorized to utilize INTELSAT space segment. As regards the Satellite Act, the proponents rely substantially on Section 201(c)(2), which charges the Commission to:

> insure that all present and future authorized carriers shall have *nondiscriminatory use of, and equitable access to*, the communications satellite system . . . *under just and reasonable charges*, classifications, *practices*, regulations, and other terms and conditions and *regulate the manner in which available facilities* of the system . . . *are allocated* among such users thereof.[33]

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[31] *See, e.g.*, ITT Comments at 5-6; WUI Comments at 45.

[32] *See e.g.*, HTC Comments at 16-17.

[33] 47 USC Section 721(c)(2) (emphasis added).

23. These parties also cite with approval Section 201(c)(7). They claim that since this provision expressly grants the Commission authority to authorize U.S. carriers to construct and operate earth stations used in connection with INTELSAT space segment,[34] it necessarily contains incidental authority for the Commission to require that Comsat unbundle its charges for space segment. They also claim that Section 201(c)(11), which authorizes the Commission to "make rules and regulations to carry out the purposes of this Act,"[35] furnishes the Commission with substantive rulemaking authority to adopt direct access in furtherance of the intent of Congress as embodied in Section 102(c). In pertinent part, that section states:

> It is the intent of Congress that all authorized users have non-discriminatory access to the system; that maximum competition be maintained in the provision of equipment and services utilized by the system; that the corporation created under this Act [i.e, Comsat] be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public; and that the activities of the corporation . . . be consistent with the Federal antitrust laws.[36]

24. In sum, proponents of direct access interpret the Satellite Act as providing the Commission with the authority to oversee the financial relationship between Comsat and the carriers and to revise that relationship to provide for direct access upon a finding that such action would further the public interest.[37]

25. *Opponents.* As noted above, AT&T, Comsat and SIN oppose direct access. AT&T and SIN believe that the proclaimed advantages of direct access are illusory. They contest whether direct access should be adopted as a *quid pro quo* for *Authorized User II.* They argue that the carriers requesting direct access are merely seeking protection against the possibility that customers may choose to obtain basic transmission capacity directly from Comsat at the U.S. general purpose earth stations rather than contracting with the carriers for end-to-end service. AT&T and SIN do not view such protection as consistent with the Commission's pro-competitive policies and they caution the Commission that direct access, the operational and financial arrangements of which are unknown at this time, may lead to substantial diversions of traffic away from Comsat, with resulting increases in rates for the customers remaining

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[34] 47 USC Section 721(c)(7).

[35] 47 USC Section 721(c)(11).

[36] 47 USC Section 701(c).

[37] For example, WUI asserts that under the IRU option, the Commission could authorize Comsat to issue INTELSAT space segment certificates as "non-voting" securities pursuant to Sections 304(a) and 201(c)(8). *See* WUI Comments at 41. Section 304(c) authorizes Comsat "to issue, in addition to the stock authorized . . . nonvoting securities . . . as it may determine" 47 U.S.C. 734(c). Section 201(c)(8) grants the Commission jurisdiction over Comsat's debt and equity financing activities. 47 USC 721(c)(8).

with Comsat.[38] Consequently, they urge that, in reaching its conclusions, the Commission weigh the *public* benefits and detriments of direct access, and not merely its proclaimed benefits to the ISCs.

26. While AT&T opposes direct access, it nonetheless takes exception to the suggestion that it be precluded from obtaining direct access should the Commission decide to implement the policy. To do so, AT&T states, would make a mockery of the goal of competition and violate the unlawful discrimination proscriptions of the Communications Act of 1934 and the Satellite Act. AT&T finds no valid distinction to be drawn between it and the other ISCs in terms of eligibility for direct access. Accordingly, it would view any restrictive application of direct access as a "blatant form of discount that benefits a favored group."[39]

27. Comsat opposes direct access on legal and policy grounds. As to the former, Comsat argues that direct access will substantially alter its role in providing international satellite communications service, and, as such, cannot be squared with the existing statutory scheme. First, Comsat cites Section 102(c) of the Satellite Act, which provides that U.S. participation in the system be in the form of "a private corporation." Comsat maintains that this language clearly indicates congressional intent to exclude all other entities than Comsat from representing U.S. interests in INTELSAT.

28. Second, Comsat alleges that Section 305(a)(1) of the Satellite Act provides unequivocally for Comsat's exclusive participation in the ownership of the global system. It believes that by this provision and other subsections of Section 305,[40] Congress chose Comsat and Comsat alone to be the U.S. investor in INTELSAT and the U.S. supplier of space segment to other carriers and authorized entities for hire. Thus, Comsat argues that to the extent either the lease or IRU direct access options would allow for carrier investment in space segment, and rate base treatment of such investment, these approaches are vulnerable to attack on legal grounds.[41]

29. Third, Comsat submits that whereas Section 305 grants it exclusive ownership of the U.S. share of the INTELSAT system, the references

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[38] AT&T Comments at 4-6; SIN Comments at 4.

[39] AT&T Reply at 11.

[40] Other provisions cited by Comsat are Section 305(a)(2), which authorizes Comsat to "furnish" channels of communications to U.S. carriers "for hire;" Section 305(b)(2), which permits Comsat to "acquire" communications satellite facilities "by purchase;" and Section 305(b)(4), which authorizes Comsat to "contract" with authorized users for the services of the system. 47 USC Sections 735(a)(2), (b)(2), (4).

[41] Comsat also asserts that in addition to being prohibited by the Satellite Act, any transfer of its space segment investment to the rate bases of the carriers would constitute an illegal confiscation of its property without due process under the Fifth Amendment of the Constitution.

in Section 201(c)(2) to "nondiscriminatory use of, and equitable access to" the system must be read as pertaining only to the Commission's authority to insure that all who seek to acquire INTELSAT space segment *from* Comsat are subject to the same terms and conditions. That is, were Comsat to establish a corporate subsidiary to offer end-to-end communications services to the public, the parent company, in its capacity as U.S. Signatory, would be required to offer space segment capacity to its subsidiary and to competing carriers under identical terms and conditions pursuant to Section 201(c)(2) and our *Comsat Structure* and *Authorized User II* decisions. Therefore, Comsat disputes that Section 201(c)(2) either authorizes other carriers to acquire space segment capacity directly from INTELSAT or mandates that the Commission require Comsat to offer space segment at the IUC space segment rate.

30. Comsat also objects to direct access as a matter of policy. It believes that under direct access it would be prevented from recovering all of the costs associated with the activities in which it participates as U.S. Signatory to INTELSAT. According to Comsat, these activities include its participation in financial, operational and technical planning, in the evaluation of proposals for, and conduct, of INTELSAT research and development at Comsat Labs, in the planning and operation of the U.S. international earth station network, and in other activities which are geared to increasing the quality and efficiency of international satellite communications and reducing the rates of service. Comsat argues that the costs associated with these activities, including an allocated proportion of the costs of its corporate headquarters and Comsat Labs, rightfully should be borne by the ratepayer.[42] In addition, Comsat claims that direct access would not provide for the fair return on its investment to which it is statutorily-entitled in order to compensate its shareholders and attract new capital.

31. Comsat claims that in their attempt to avoid the aforementioned costs, the carriers supporting direct access have misrepresented the function of the IUC. Contrary to their assertions, Comsat characterizes the IUC as no more than an accounting device employed by INTELSAT to balance a Signatory's investment share in the system against its actual use of the system. Comsat asserts that unless its investment in INTELSAT exceeds its usage of the system, a Signatory receives no return on its INTELSAT investment from the IUC.[43] Nor does Comsat as U.S. Signatory receive through the IUC compensation for any of its own

[42] Comsat Reply at 17-20.

[43] "If usage equals ownership share, the net payment by a Signatory equals its share (based on usage) of INTELSAT operating and maintenance expense. The Signatory must then recover these costs and other costs in its rates to customers." Comsat Comments at 17.

legitimate costs (as opposed to those of INTELSAT). Comsat emphasizes that the IUC represents only INTELSAT's costs, which are only a part of Comsat's total costs. Comsat asserts since it is statutorily-entitled to, and does in fact, include in its bundled tariff all costs associated with its provision of INTELSAT satellite capacity to customers in the United States, its space segment rate cannot rightfully be deemed unreasonable solely on the basis that it may be higher than the IUC rate. Therefore, Comsat contends that to the extent that direct access would prevent it from recouping the costs to which it is entitled and earing a fair return on its INTELSAT investment, direct access is inappropriate as a matter of policy.

II. *Discussion*

A. *Overview*

32. We initiated this proceeding to consider various proposals to modify the arrangements by which carriers acquire satellite capacity from INTELSAT. The thrust of these proposals is that direct access to INTELSAT capacity by carriers other than Comsat would result in the more efficient provision of international satellite service, thus reducing costs for carriers and rates for users. Our review of these proposals and the record in this proceeding leads us to conclude that direct access in the form of capitalized leases, noncapitalized leases or IRU interests would not produce significant economic savings to carriers or users. We therefore shall not at present proceed further with the direct access proposals before us. At the same time, we do not minimize the problems that the direct access proposals were designed to address. We believe, rather, that the concerns prompting the calls for direct access are better addressed through the traditional regulatory mechanisms of Title II of the Communications Act. In addition, we believe that the actions we are taking today in the ongoing *Comsat Structure* and *Earth Station Ownership* proceedings should mitigate concerns regarding the costs which should properly be included in Comsat's space segment rate, thereby obviating the need for direct access. Should these alternative actions prove ineffective, however, we reserve the discretion to reconsider direct access.

B. *Issue Analysis*

33. Looking first at the cost issue, those filing comments in support of direct access argue that Comsat has loaded the space segment portion of its combined Tariff FCC No. 101 with costs and charges not properly allocable to its provision of space segment to its customers. Under a policy of direct access and mandatory unbundling, these parties assert, Comsat would be precluded from engaging in such conduct because the IUC would serve as the basis of measurement of the reasonableness of

Comsat's space segment charges. In other words, the proponents believe that Comsat's rate for INTELSAT space segment is excessive and, since this Commission has been unable to reduce it through traditional regulatory mechanisms, we should now introduce a new device to accomplish this end. We disagree.

34. The IUC is not a measure of Comsat's cost of providing satellite circuits acquired from INTELSAT to its customers in the United States. The IUC was developed by INTELSAT to take into account the fact that INTELSAT, as a non-profit organization established by international treaty, has a unique financial structure. The IUC serves as a measure, expressed on a per-circuit basis, of the costs INTELSAT incurs in constructing and operating the global satellite system. Since 1981, INTELSAT's satellite utilization charge for full-time, voice-grade service has been $390 per month per circuit. The level of the IUC is set so as to recover amortization of capital (depreciation expense), the operating expenses of the INTELSAT system and compensation to Signatories for the use of their capital. (The rate of compensation is targeted at 14 percent per year.) The sum total of the utilization charges INTELSAT receives for its various services constitute INTELSAT's operating revenues alone.[44] The IUC is not intended to, and does not include any amount to compensate Comsat for the internal costs which Comsat incurs making satellite circuits available to U.S. customers and engaging in other activities connected with its role as U.S. Signatory to INTELSAT under the INTELSAT Agreements and the Satellite Act.

35. By March 1982, the net capital contribution by INTELSAT Signatories, including contractual commitments for various research and development and facilities planning projects, exceeded $2 billion.[45] Taking into account capital expenditures for the year of $332 million, the total net investment in the INTELSAT system exceeded $1 billion in 1982.[46] As the statutorily-authorized U.S. owner-investor in the system, Comsat must assume its pro-rata share of this investment. It does so through periodic capital payments to INTELSAT. It also, however, receives from INTELSAT reimbursement for the use of that portion of the total INTELSAT system in which it invests but does not use. In other words, Comsat receives payments from third parties who use its excess space segment

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[44] In 1981, INTELSAT had total operating revenues of $249 million. Of this amount, $56 million (22.5%) went to cover operating expenses, $75 million (30.1%) went towards depreciation and $118 million (47.4%) constituted compensation for use of capital. Corresponding totals for 1982 were $315 million in total revenues, of which $66 million (21%) represented operating expenses, $89 million (28.2%) represented depreciation and $160 million (50.8%) represented compensation for use of capital. *See* INTELSAT 10th Annual Report, *supra* note 3, at 28.

[45] Comsat Comments at 9.

[46] INTELSAT 10th Annual Report, *supra* note 3, at 28.

capacity. The compensation it receives from this service is set by INTELSAT and included as an element of its utilization charge. It is this aspect of the IUC that has led to considerable confusion about how Comsat sets its rate for INTELSAT space segment.

36. Contrary to the assertions of some of the parties to this proceeding, the amount of compensation Comsat receives as a return on its INTELSAT investment through the IUC mechanism does not provide Comsat a full return on its total investment in INTELSAT. Under the complex financing system INTELSAT has constructed, a Signatory to INTELSAT is entitled to invest in and utilize the system, but a Signatory's ownership share does not necessarily have to equal its usage. As we have mentioned, the IUC was devised to compensate Signatories for the use of their share of space segment by third parties. Thus, the IUC rate of $390 per circuit per month, which includes a 14 percent pre-tax return, assumes economic significance for Comsat only to the extent that others utilize a portion of the system in which Comsat has invested. For example, Comsat owned 24.36 percent of the INTELSAT system in 1983; however, Comsat utilized only 21 percent of the system. This means that through the IUC, Comsat earned a return only on that portion of the INTELSAT system which it financed but did not itself use. Had Comsat's usage equalled its ownership interest, it would not have received an IUC-based return from INTELSAT, only use, on a "non-profit" basis, of its proportionate share of the services of the system.[47] Comsat is entitled, of course, to earn a return on its total investment in the INTELSAT system. This return is to be recovered through charges for the satellite circuits it makes available to its customers.[48] Therefore, Comsat includes a return element in its tariff.

37. Since it has been asserted that the carriers should be required to pay Comsat no more than $390 and a fee to cover Comsat's administrative and maintenance costs, we will now examine each of the elements in the two categories of expenses which comprise the space segment portion of Comsat's tariff to determine: (a) whether they are properly allocated; (b) whether they would be covered by an IUC-based charge; and (c) whether they would be eliminated or reduced under the direct access proposals before us.

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[47] For a full description of the financial arrangements under which INTELSAT operates, *see* Statement of Richard R. Colino, Director General-Designate, INTELSAT, before the Senate Foreign Relations Committee, Subcommittee on Arms Control, Oceans, International Operations and Environment, Appendix No. 12 (October 19, 1983) ("Colino Statement").

[48] A relatively small percentage of Comsat's total return is recovered by Comsat from INTELSAT. But, as we have said, this is reflected in the difference between Comsat's investment share and its usage. This constitutes but 14 percent of Comsat's total investment in the system.

38. Pursuant to basic Tariff FCC No. 101, Comsat leases full-time voice-grade circuits to carriers and other authorized users at a rate of $1125 per month. This price includes the costs both of space segment and earth station facilities. Comsat states in its pleadings that 71 percent, or $800, of its tariff price is allocable to the space segment.[49] As U.S. Signatory to INTELSAT Comsat incurs and recovers through the space segment portion of its tariff two categories of legitimate expenses. The first category consists of the two cost elements associated with Comsat's INTELSAT operational expenses: Comsat's proportionate share of depreciation expenses on INTELSAT satellites; and Comsat's proportionate share of INTELSAT's operating and maintenance expenses. The second category of expenses recovered in Comsat's space segment charge consists of three components which are unique to Comsat as U.S. Signatory: Comsat's internal operations and maintenance, research and development, and corporate headquarters expenses; compensation to enable Comsat to realize its Commission-authorized 11.48-12.48 percent post-tax return on its satellite investment; and Comsat's income tax on the return on its INTELSAT investment.

39. *Comsat's INTELSAT operational expenses.* In the NOI, we requested that interested parties explain how the two direct access proposals would be implemented. With respect to the capitalized lease option, RCA suggests that the carriers pay Comsat the IUC during the term of the lease, any administrative costs Comsat would incur in arranging for the leased facilities, and the present value of the capitalized lease. The latter, according to RCA, would be equal to "the net book value of the leased facilities at the time of the commencement of the lease, less the present value of the residual value of the facilities upon expiration of the lease."[50] In suggesting that the carriers pay the IUC for any facilities leased from Comsat, RCA is really saying that some of Comsat's total capital investment in INTELSAT would be assumed by the leasing carriers under this particular option.[51] This also implies assumption of an equal proportion of Comsat's share of depreciation of INTELSAT satellites. It is clear, however, that a sharing of depreciation expenses would in no way alter the total amount of depreciation INTELSAT takes every year.

40. As to INTELSAT's operating and maintenance expenses, these too would merely be "passed through" Comsat to the leasing carriers as an

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[49] Comsat Comments at 25.

[50] RCA Comments at 32-33. Other parties responding to our request for suggestions on the implementation of direct access merely reiterated or lent support to RCA's proposal. *See*, e.g., WUI Reply at 13-15.

[51] RCA Comments, Appendix 2, p. 1.

element of the IUC.[52] Again, however, the nature or level of expenses INTELSAT incurs in operating the global system would not be altered or reduced. These expenses would be separate and distinct from Comsat's own administrative and maintenance costs; i.e. those costs for which the leasing carriers would compensate Comsat through periodic payment of a "ministerial fee" as described in the NOI. Thus, while RCA acknowledges that depreciation expenses on INTELSAT satellites and INTELSAT's operating and maintenance expenses are legitimate cost elements to be shared with Comsat through payment of the IUC, RCA has not shown that the lease option set forth in the NOI would produce any cost savings in these areas.

41. In its comments, RCA also proposed two alternative lease options.[53] The principle distinction between these alternatives and the lease option set forth in the NOI is that under the former, the leasing carriers would not assume any portion of Comsat's investment in INTELSAT space segment.[54] Insofar as the carriers would continue to pay Comsat the IUC for the facilities leased to them, our finding that the space-segment-related expenses currently included in Comsat's tariff would not be reduced under the NOI lease option also holds true with respect to RCA's lease alternatives.

42. There is also no evidence in the record that this category of expenses can be eliminated or reduced under the IRU direct access option. None of the parties preferring the IRU to the lease option (DOD, NTIA, TRT, WUI) has suggested that the total U.S. investment in, and associated depreciation of, INTELSAT satellite facilities would be reduced, rather than shared between Comsat and those carriers electing for IRUs.[55] Nor has the provision of the IRU proposal which would require IRU-holders to "pay Comsat for its share of INTELSAT operating costs" been contested, or the level of these costs been disputed.

43. We find, therefore, that Comsat's portion of depreciation expenses on INTELSAT satellites and INTELSAT's operating and maintenance expenses are legitimate expenses which would be shared by these entities obtaining direct access on a pro-rata basis, whether such access be in the form of leases (in which case the lessees would pay Comsat the IUC for the facilities leased) or IRUs. Further, we conclude that this category of expenses, as presently included in the space segment of Comsat's FCC Tariff No. 101, would not at all be reduced under any form of direct access.

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[52] *Id.*

[53] *See* para. 13, *supra.*

[54] RCA Comments, p. 35.

[55] *See*, e.g., TRT Reply at 9, NTIA Comments, *supra* note 25, at 16, 19.

44. *Comsat's internal Signatory and related expenses and return.* As we have mentioned, the space segment portion of Comsat's tariff also includes a category of expenses unique to Comsat as U.S. Signatory to INTELSAT: Comsat's return on its satellite investment; the income tax Comsat is obligated to pay on that return; and Comsat's internal operations and maintenance, research and development, and corporate headquarters expenses. The issues before us are whether these cost elements are properly allocable to Comsat's space segment rate, whether they would be recovered under the direct access options before us, and whether any of them will be eliminated or reduced under direct access. If direct access will produce savings to carriers and users, it will be from costs relating to Comsat's (rather than INTELSAT's) activities and operations.

45. With regard to the allocation question, Congress enacted the Satellite Act for the express purpose of creating a private "for profit" corporation, subject to taxation, to represent the United States in the establishment of a commercial global communications satellite system, and to offer, "for hire," channels of communications to customers in the United States as a common carrier fully subject to the provisions of the Communications Act of 1934.[56] In the *Comsat Rate Case*, we authorized Comsat to earn an 11.48 percent return on investment, with an additional 1 percent for efficiency.[57]

46. Pursuant to the Satellite Act, Comsat is also authorized to engage in research and development in support of its currently-defined mission, and to develop plans for the technical specifications of all elements of the INTELSAT system.[58] In the *Comsat Rate Case*, we determined that a proportion of the costs of these activities may be included in Comsat's revenue requirement.[59] Moreover, Comsat has other expenses associated with its role as a Signatory (*e.g.*, maintenance of a corporate headquarters, attendance at meetings abroad, preparation of documents and position papers, briefings of the Department of State, NTIA and the Commission, compilation and dissemination of documents emanating from INTELSAT). Given the statutorily-based nature of these responsibilities, it is clear that some portion of Comsat's internal administrative, operating, maintenance, corporate headquarters and research and development expenses related to its mission properly should be allocated to the space segment portion of its tariff.

47. Proponents of direct access lease options assume that a price based on the IUC and a "ministerial fee" would enable Comsat to meet its

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[56] 47 USC Sections 701(a), 731, 735(a), (c), 741.

[57] 56 FCC 2d at 1173, 68 FCC 2d at 950-951.

[58] 47 USC Section 735(b)(1), (5).

[59] 56 FCC 2d at 1125.

expenses and receive an adequate return on its investment in the system, but would be lower than the space segment portion of Comsat's bundled tariff. They believe, apparently, that the IUC and "ministerial fees" would cover or reduce the Signatory and related expense category currently included in Comsat's space segment charge. Yet the levels of Comsat's pre-tax return on satellite investment should be the same under direct access as under the present tariff scheme. In either case, Comsat's charge to other carriers should depend upon the level of Comsat's total investment in INTELSAT and the appropriateness of the percentage rate of return applied to that investment.

48. All parties concede that the "ministerial fee" is meant to compensate Comsat for internal administrative and other costs related to its provision of space segment facilities, as opposed to those related to Comsat's investment in the system, including taxes. Therefore, INTELSAT's current IUC presumably would serve as the mechanism whereby Comsat would receive a return on its INTELSAT investment under the direct access lease options which have been proposed[60] Those who expouse this view overlook, however, the crucial fact that their IUC-based payments would not provide Comsat a *full* return on its total INTELSAT investment. As we mentioned earlier, Comsat has been authorized an overall return on investment of 11.48-12.48 percent post-tax. We find the notion of a direct access lease price based upon the IUC ill-founded, insofar as it would appear to constrain Comsat to a post-tax rate of return well below that recognized by the Commission as necessary to its financial well-being.

49. Under the direct access IRU option, a carrier could in effect become an indirect investor in the INTELSAT system. Proponents of the IRU direct access option claim that under this arrangement, economies would be realized as a result a sharing of the risk of investment in INTELSAT between Comsat and the other carriers and more efficient utilization of the system.[61] Presumably, these economies would redound to the benefit of the end-user. This, however, is a matter of speculation. If the carriers investing in IRUs had costs of capital lower than Comsat's, then perhaps some economies could be realized. But we doubt that the carriers' respective costs of capital would be appreciably lower than Comsat's in any event. Furthermore, there would be no guarantee that the carriers would flow-through these savings to end-users. It also appears that the magnitude of the potential reduction to users would be limited by other factors. First, even Comsat's combined earth/space segment tariff rate represents only a portion of an international carrier's

[60] *See*, e.g., WUI Comments at 24-26; TRT Reply at 11-12.

[61] DOJ Comments at 14; TRT Comments at 12.

typical cost of providing service to the public.[62] Second, while competition is an effective means of eliminating excess profits, the carriers will doubtless concede that there must be some allowance for normal profit. As a result, while IRU-direct access might help trim the cost to U.S. users of INTELSAT space segment, it is doubtful that any savings in this area could exceed a few percentage points of the total cost to U.S. users of a communications channel. Third, unlike cable facilities, the nature of the satellite medium (the variable number of antennas per satellite, the variable size of antennas and the variable density of the traffic stream handled over the antennas) makes it virtually impossible to calculate the base capacity, and hence the base price of a satellite-circuit IRU.

50. Turning to the issue of the impact of direct access on the internal operations and maintenance, corporate headquarters and research and development expenses which are unique to Comsat, the question is whether any form of direct access would reduce these expenses, and consequently Comsat's charges, in the absence of existing regulatory tools. For convenience, we will identify these as "general and administrative" ("G&A") and "R&D" expenses. On the basis of the record, we find that were we to adopt direct access, we would merely be changing the form in which these expenses would be recovered and, in the process, adding an unnecessary layer of regulation with its attendant costs. In short, these legitimate costs would be included in either the IRU price, any lease or the "ministerial fee."

51. Comsat has in recent years expanded its activities into a number of non-common-carrier, non-jurisdictional lines of business. As a consequence, the proper allocation between its jurisdictional and non-jurisdictional accounts of its common G&A expenses has become increasingly problematic. We agree with the proponents of direct access that Comsat's space segment customers should not be made to bear the costs of activities which are unrelated to the provision of jurisdictional services. Theoretically, under the "ministerial fee" of the direct access lease option or the "pro-rata corporate costs-sharing" element of the IRU option, the appropriate level of Comsat's jurisdictional G&A expenses would have to be set. Yet, no one has shown how direct access would alter or enhance the process of determining the appropriate G&A charge. That process would be exactly the same regardless of whether we decided to go forward with direct access, or subjected the G&A component of its tariff rate to regulatory scrutiny.

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[62] While Comsat's combined tariff rate is $1125, the carriers typically charge approximately $4000 per channel per month for voice-grade (telephone) end-to-end service. *See* Colino Statement, *supra* note 47, at Appendix No. 5, pp. 2-3. *See also* our discussion below at paras. 58-59.

52. In fact, the issue of Comsat's G&A expenses is currently under review. In our companion order in the ongoing *Comsat Structure* proceeding we determine that certain categories of expenditures do not benefit its jurisdictional-service customers, and direct Comsat to remove them from its jurisdictional revenue requirement. We also refine Comsat's cost allocation formulas. These actions should lead to reductions in Comsat's space segment rate, and we intend to take whatever additional actions are necessary to remove from Comsat's jurisdictional accounts and space segment charge all inappropriate cost elements. It is clear however, that certain G&A expenditures are a legitimate cost of any carrier's business, and may properly be included in its revenue requirement. Direct access would not eliminate the need to determine the level of Signatory-related G&A expenses which properly should be borne by the users of Comsat's services.

53. Much the same is true of Comsat's internal Signatory-related R&D expenses. Here again, with the evolution of the INTELSAT organization, and the change in Comsat's role from manager and sole provider of R&D to INTELSAT to that of one of many competitive bidders for the R&D contracts let by INTELSAT, Comsat's R&D activities have taken a new direction. As Comsat has become more involved in non-jurisdictional activities, a growing portion of its R&D activities has been in support of its competitive ventures.

54. As a result, we are more carefully scrutinizing Comsat's R&D expenditures to ensure that only those which benefit its jurisdictional activities are charged to its jurisdictional ratepayers. In the *Comsat Structure* order adopted today, we direct Comsat to reallocate certain categories of R&D expenditures to non-jurisdictional accounts. We wish to emphasize, however, that Comsat is entitled to engage in a reasonable amount of R&D related to its current mission. Direct access can affect the manner in which Comsat is compensated for this R&D (i.e., as a "ministerial" payment rather than a tariff charge), but not the overall amount of such compensation.

55. In view of all of the above, we conclude that direct access in any form would not appreciably diminish any of the expense elements in the two categories of costs which comprise the space segment portion of Comsat's tariff. Were we to adopt direct access, at best we would merely be dividing certain fixed space segment-related costs between Comsat and others. We find very little to be gained from such action in terms of cost savings or increased efficiency. Beyond this, we are not persuaded that, apart from the other regulatory measures to which we refer in the preceding paragraphs, direct access will have any unique downward effect on the costs of the other activities in which Comsat engages pursuant to its Signatory role in INTELSAT. Put another way, direct

access, in and of itself, will not produce efficiencies and cost savings in this area, the assertions of its proponents notwithstanding.

56. The premise that direct access will significantly reduce the cost to carriers and other authorized entities of INTELSAT space segment serves as the basis for the two remaining arguments in favor of direct access: that it will enable other carriers to compete with Comsat on an equal basis; and that it will prevent Comsat from subsidizing with revenues generated from its INTELSAT business any competitive subsidiary established to offer end-to-end service. These assertions are but reiterations of concerns previously raised and dismissed as premature and lacking in foundation in our *Authorized User II* decision.[63] Having determined above that the premise underlying these assertions is groundless, we would not be inclined to revisit them here. However, the U.S. Court of Appeals for the D.C. Circuit has now vacated *Authorized User II*, and denied our petition for rehearing. In its decision, the court disagreed with our competitive-impact analysis. The court remanded the case to us with specific instructions that we consider the direct access question before any implementation of a new *Authorized User* policy. In that connection, the court enumerated what it believed would be the effects of direct access upon both "intramodal" (satellite to satellite) and "intermodal" (cable to satellite) competition, and suggested that we consider these issues in passing on the merits of direct access.

57. The question of the effect of the direct access proposals before us on intramodal and intermodal competition in the international telecommunications market is complex, given the existence of firms whose size, service offerings and investment interests have traditionally dictated their behavior. In fact, it is difficult as a regulatory matter to make theoretical judgments about how such firms would respond to the various direct access alternatives under review. In reaching conclusions on the competitive impact of direct access, as directed by the Court of Appeals, we must consider the pleadings of the parties to this proceeding and the *Authorized User II* case, among other pertinent facts.

58. Looking first at intramodal competition, the court apparently accepted the argument that, absent direct access, no carrier could compete with Comsat in leasing satellite circuits to users under the

[63] We stated there that none of the carriers had shown that they would be unable to compete with Comsat in the provision of leased-channel service, and hence, there was no basis for us to conclude that there would be any diversion of traffic to Comsat. We also found that, under a worst-case assumption, even were the carriers to lose all or a substantial portion of their leased-channel revenues, they would not be put out of business or rendered incapable of providing good-quality service to the customers of their other services. *See* 90 FCC 2d at 1416.

revised *Authorized User* policy which we sought to implement.[64] The court reasoned that since Comsat would under our policy offer circuits to users at the same rate it offers them to carriers, no carrier could underprice Comsat and all customers would shift to Comsat. We cannot agree with this analysis. At the outset, we note that requiring Comsat's World Systems Division to offer basic transmission capacity to end-users at U.S. earth stations would not put the existing carriers into competition with Comsat. Comsat would derive the same revenues for a satellite circuit (*i.e.*, its tariff rate) whether it leased its circuits to a carrier or directly to an end-user. Rather, the carriers would compete with the end-user's own ability to configure the end-to-end service for itself. It appears that the Court of Appeals misperceived the nature of the services involved when it asserted that "Comsat's basic transmission service and the satellite leased-channel service offered by the IRCs are virtually identical."[65] In actuality, under the policy we had adopted, Comsat would have supplied only a portion of end-to-end leased-channel service: the satellite link (that portion from the earth station to the satellite). Comsat would have had nothing to do with the terrestrial end-links between the earth station and a customer's premises, or with the overseas portion of the full service, under *Authorized User II*.

59. To illustrate this point, we refer to RCA's Emergency Motion to Stay our decision in *Authorized User II*, filed with the U.S. Court of Appeals for the D.C. Circuit on December 30, 1982. In the following excerpt from an affidavit attached as Appendix A to RCA's motion, an executive officer of the corporation distinguishes between basic transmission capacity (to which he refers as "Intelsat satellite service") and "through end-to-end" leased channel service:

> To provide [leased channel] communications to its customers, RCA Globcom arranges for the through end-to-end service: that is, we lease from terrestrial carriers the necessary communications lines from the customer's premises to the means of international transmission – *i.e.*, either a satellite earth station or an undersea cablehead.
>
> In addition to the foregoing responsibilities, RCA Globcom typically arranges with the foreign communications administration with responsibility at the overseas end of the leased circuit in question to arrange necessary communications lines from the foreign satellite earth station . . . to the premises where the leased circuit is to terminate.
>
> Also, in establishing a leased channel, RCA Globcom adjusts the transmission quality of the line in question to accommodate the particular type of transmission to be used and tests the circuit before turning it over to the customer. While the circuit

[64] ITT World Communications Inc. v. FCC, *supra* note 8, at 44. The court stated, "In light of the leased-channel market's high sensitivity to price, intramodal competition for leased-channel business does not appear feasible under the FCC's *Authorized User II* policy." *Id.* at 35.

[65] *Id.* at 44-46.

> is in operation, RCA Globcom technicians monitor it around the clock and, if a fault develops, coordinate with any other connecting carriers at the U.S. and foreign points in locating, isolating and clearing the fault...
>
> [I]nternational satellite services are provided by Intelsat... The entity designated as owner and representative to Intelsat on behalf of the United States is Comsat.
>
> [W]hen a leased circuit operated by RCA Globcom uses satellite transmission for the international leg, we arrange with and pay a terrestrial carrier (usually AT&T) its tariffed charges for the landhaul line to an earth station (which averages $600 per month for a standard voice circuit) and Comsat its tariffed international charges of $1125 a month per voice circuit for providing its earth station services and for the INTELSAT satellite service [$325 and $800 respectively, according to Comsat].
>
> *Comsat's charges to us are included in RCA Globcom's tariff rates to the customer, together with landline expenses, charges for the services we perform, an allocation of our investment in plant, and an element for our operating overhead and profit...* RCA Globcom's current tariff rate to the customer for a leased voice/data circuit between the United States East Coast and the United Kingdom... is $3710 per month. (footnote omitted) (emphasis added).[66]

60. We have quoted at length from RCA's motion to indicate the extent to which the carriers themselves have acknowledged that, contrary to the views of the Court of Appeals, end-to-end leased channel service is quite different from, and more expensive than, the basic transmission capacity service we had required Comsat to provide to all customers at U.S. general purpose earth stations under *Authorized User II*. We do not pursue this disagreement with the Court of Appeals just for the sake of argument. We do so on the basis of our knowledge of the industry and the behavior of the firms and customers in the market. Because the court does not purport to be an original fact finder and because it remanded the case to us for further consideration in light of its opinion, we must assume that it intended the Commission on remand to make our analysis of the pertinent facts, taking account of what the court has said. We do not perceive the court's mandate as foreclosing the conclusions we reach now on the basis of further analysis.

61. The Court of Appeals also apparently had an incomplete understanding of the international telecommunications market insofar as it assumed that leased-channel customers are by-and-large sophisticated and able to arrange for their own terrestrial end-links, both domestic and foreign, without recourse to the IRCs.[67] Under the policy we had adopted in *Authorized User II*, it is likely that only those customers with sufficient technical and financial wherewithal would have been able to obtain the Comsat portion directly and make their own arrangements for the terrestrial links from the earth station to their premises and for the

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[66] Affidavit of Kenneth H. Lassig, Vice President – Finance and Treasurer, RCA Global Communications, Inc. at paras. 4-9, attached as Appendix A to RCA's Emergency Petition to Stay, *ITT World Communications Inc. v FCC, supra* note 8.

[67] *Id.* at 34, n.8.

overseas portion of the service. In much the same manner as described by RCA, it would have been necessary for end-users to complete the service by assembling the other portions of "through" service, and provide for continuous monitoring/testing arrangements, tasks which clearly would have required considerable effort and cost. Were the existing leased-channel-service carriers, who already have ongoing relationships with foreign communications entities and U.S. domestic carriers, able to package the elements of end-to-end service more efficiently than the customers themselves, in all likelihood these carriers would have been able to retain their leased-channel business under the policy we adopted in *Authorized User II*. Were they unable to do so, the result would have been lower cost for the end-user serving itself, not a diversion of revenues to Comsat. As we have already stated, Comsat would have obtained the same revenues whether it had leased basic transmission capacity directly to end-users or to carriers for use as an element of their end-to-end service.

62. As to our decision to allow a Comsat subsidiary to offer end-to-end service, including leased-channel service, we find that direct access similarly would not be required to preserve fair competition if the *Authorized User II* policy were retained. We determined that such a subsidiary, if established, would be required to acquire satellite services under the same tariff and at the same rates applicable to the existing carriers. The carriers would, thus, be on the same footing as a Comsat subsidiary in competing for the business of the end-user. Direct access would not alter that situation. It would not be required to prevent Comsat's competitive subsidiary from receiving preferential rates. Nor would it give the carriers any protection from anticompetitive conduct that our separate subsidiary requirement and the Section 214 process would not offer them.[68]

63. Turning to the question of intermodal competition, we continue to believe that the carriers would be able to compete with Comsat under the *Authorized User II* policy if we should decide to retain that policy. That policy would allow the carriers to decomposite their leased-channel rates and to offer separate satellite-based and cable-based rates. None of the carriers has attempted to show that it would be unable to price its cable-based leased-channel services at a rate competitive with the combination of Comsat's basic transmission capacity and customer-provided connecting arrangements, or with a rate charged by a Comsat subsidiary for a satellite-based end-to-end service. We are aware that the court disagreed

[68] There is some question as to whether Comsat would choose to establish a subsidiary to offer end-to-end service. *See* Comsat Comments at 36, n. 61. Some commenters, in particular DOJ, support direct access only to the extent that Comsat would actually exercise any authority it might obtain to provide end-to-end service. DOJ Reply at 2.

with this view, apparently believing that cable circuits are more costly than satellite circuits. We however, know of no data which support such a finding.[69] We find no reason to assume that the carriers would lose all their leased-channel customers. We note, for example, that RCA predicts a diversion to Comsat of 69.7 percent of the leased channels it currently provides to the Department of Defense (i.e., all 43 channels utilizing satellite facilities, and 33 of 66 channels utilizing cable facilities).[70] Yet DOD, the largest U.S. user of leased-channel services, accounting for more than one-third of all such services, has stated that it has no intention of shifting its traffic to Comsat, even if it could deal directly with Comsat.[71] We see no reason to doubt DOD's assertions.

64. Although the Court of Appeals focused almost exclusively on whether intermodal competition would be stimulated or inhibited by a decision to grant some form of direct access to the IRCs, presumably, if there are any economic benefits to the end-user to be derived, then all carriers should be eligible to participate. Thus it appears to us that the effect on intermodal competition of the direct access options described in the NOI would depend to a significant degree on the behavior of AT&T.[72] AT&T occupies a unique position as the major source of traffic and the major owner of cable facilities in the international marketplace. It currently utilizes 90 percent of the space segment Comsat leases to the

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[69] The Court compared the projected cost of a circuit in TAT-8, $19,000, with the annual rental of a satellite circuit, $13,500 (12 x $1125), and concluded that the satellite circuit is cheaper. One cannot compare a yearly rental of a satellite circuit to the capital cost of a cable circuit. For one thing a cable has a useful life of 25 years and its annual per circuit revenue requirement includes a number of expenses, such as maintenance and administrative. The question of how cable and satellites compare in cost is complex and depends on a variety of factors, not the least of which are the distances involved, the level of usage and the density of traffic on particular routes. Differences in service quality and reliability, as well as customer preference, also affect competition between cable and satellite-based services.

[70] RCA Comments, Appendix 1 at 5.

[71] DOD states that it is satisfied, generally, with the service that it gets from the end-to-end service carriers. According to DOD, "only those unique and critical instances of dedicated wideband international satellite links between Standard B earth stations located on military installations, where 'end-to-end' service may be tantamount to what the FCC now terms 'basic INTELSAT transmission,' are candidates for transfer to Comsat". DOD further indicates that as of the date of its statement (February 19, 1983), it had been unable to obtain foreign operating agreements to locate Standard B earth stations on overseas military installations. *See* Affidavit of Lieutenant General William J. Hilsman, Director, Defense Communications Agency, DOD, attached to Opposition of Federal Communications Commission to Emergency Motion to Stay, *ITT World Communications Inc v FCC, supra* note 8.

[72] We do not address RCA's alternative direct access lease proposals in this analysis because they do not provide for rate base treatment of direct access leaseholds as would the lease option presented in the NOI. At any rate, we have already concluded that RCA's proposals are not likely to result in cost savings to the end-user.

carriers. Ineluctably, the direct access schemes set forth in the NOI would enable AT&T to exercise control over investment decisions on the U.S. end regarding both terrestrial and satellite facilities. Were AT&T to decomposite its rates, offer separate satellite-based and cable-based rates and route its traffic over the most cost-efficient medium of transmission, then direct access, by permitting AT&T to invest in both satellites and cables, would appear to promote intermodal competition, AT&T's market dominance notwithstanding. On the other hand, through acquisition of direct access capitalized leaseholds or IRUs commensurate with its usage of satellite circuits, AT&T could in effect control investment decisions relating to INTELSAT space segment, by and large removing that function from Comsat. Such a development could be detrimental to the promotion of intermodal competition, insofar as AT&T could bias investment and circuit utilization decisions in favor of one medium over the other. Moreover, unlike earth stations, the Commission would have less effective and timely means of monitoring and curbing AT&T should it attempt to engage in anti-competitive practices with respect to space segment utilization and control.[73]

65. Once again, in analyzing these issues of competitive impact independently, we are not merely adhering to a preconceived view and disregarding the analysis of the Court of Appeals. We believe the court's analysis was based on an incomplete understanding of the industry, and we are endeavoring to analyze the matter anew on the basis of more complete facts, taking full account of the court's views. We do not read the court's opinion as making definitive fact findings that bind the Commission on remand, but rather as holding that we did not take adequate account of factors the court believed to be relevant in deciding *Authorized User II*. The Commission has an independent obligation to decide both the direct access and remanded *Authorized User II* matters on the basis of our best knowledge, giving due consideration to the court's own analysis. It remains an open question whether on remand we will reissue our revised *Authorized User* policy, or some modification of that policy. There is no evidence in the record of this proceeding, however, that

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[73] The prospect that AT&T could exert control over investment decisions relating to INTELSAT space segment is different from the issue of how to treat AT&T in the area of earth station ownership. Under our proposed new policy of competitive independent earth station ownership, we anticipate considering, on a case-by-case basis under the application processes of Titles II and III, questions of economic harm to Comsat and the impact on other carriers raised by AT&T's position as major owner of cable facilities. As we have not made a final determination on this matter, we provide opportunity for comment in the Earth Station Ownership NPRM adopted today on whether and how we should consider AT&T's unique position in the international arena in formulating our general earth station ownership policy and evaluating specific earth station applications. *See* CC Docket 82-540, FCC 84-122 at note 24.

the revised *Authorized User* policy we originally adopted would result in the competitive harms alleged here. In the absence of such evidence, there is no basis upon which to conclude that there is a need for a remedy. We thus decline to adopt the direct access proposals before us simply on the unsupported assertion that they will foster competition, especially given uncertainties as to the market behavior of AT&T, and therefore, its ultimate impact on intermodal competition.

66. In reaching our decision we noted what appears to us an excessive emphasis throughout the record on the space segment portion of Comsat's tariff. As illustrated in the pleadings filed by RCA with the U.S. Court of Appeals for the D.C. Circuit, Comsat, as U.S. Signatory to INTELSAT, provides satellite and earth station services to authorized carriers at a rate of $1125 per month per channel of communications. Carrier users then provide the facilities necessary to transmit the signal from the earth station to end-users in the United States. In addition, they execute the operating arrangements with foreign administrations necessary to complete the end-to-end service. The typical carrier charge for a voice-grade (telephone) end-to-end service is approximately $4,000 per channel per month. Just as Comsat's rate of $1125 includes its INTELSAT costs, a carrier's $4,000 rate includes Comsat's charge. Also added to the $4,000 are the carrier's cost of providing the link between the earth station and the end-user, the costs associated with providing foreign arrangements and an allowance for a return and taxes. (The actual foreign facilities are billed separately by the PTT, although carriers occasionally pass through this bill to the customer for the PTT as a billing curtesy).

67. These facts are sobering as to the possible end-user benefit of adopting the direct access proposals under review. We have not been presented with any evidence to show that the alleged savings to be realized from these proposals, assuming, *arguendo*, that such are passed-through dollar-for-dollar by carriers to end-users, would exceed more than a few percentage points of the total end-user charge. It is thus noteworthy that for all their emphasis on the issue of the appropriate level of Comsat's space segment charge, not one of the carriers advocating direct access has submitted any information as to the dollar amounts of the reductions to be enjoyed by their end-to-end service customers were we to adopt the proposals they have endorsed.

68. Finally, we note that "direct access", in the forms proposed, could also adversely affect Comsat's ability effectively to express, promote and protect the national and foreign policy interests of the United States before INTELSAT. We are not convinced that the administrative fees the proponents of direct access are willing to pay would adequately compensate Comsat for all the activities it legitimately undertakes as U.S. Signatory. It might require significant regulatory involvement to assure

Comsat's receipt of sufficient administrative fees to continue to meet its statutorily-imposed responsibilities.

III. *Summary And Conclusions*

69. We initiated this inquiry to determine whether, as had long been argued, a new policy of direct access would best enable other carriers effectively to compete with Comsat in the wake of the Commission's decisions in *Comsat Structure* and *Authorized User II*. We have addressed alleged benefits of direct access: (1) that it might serve to prevent Comsat from including excessive costs in its bundled tariff and from loading R&D and administrative costs properly allocable to the earth station segment to the less competitive space segment; (2) that it would prevent Comsat from engaging in cross-subsidization; and (3) that it would enable the IRCs to retain their leased-channel revenues and maintain their financial viability. We have also identified the potential adverse consequences of implementing the direct access schemes presented here. Having weighed their perceived benefits against their drawbacks, we conclude that the direct access concepts before us are too vague and their proclaimed benefits too uncertain to warrant further consideration at this time.

70. As to the issue of the appropriate level of Comsat's space segment charge, there is no evidence in the record which would lead us to conclude that the direct access proposals before us would in any manner aid in that judgment. Rather, we believe that the actions we are taking today in the ongoing *Comsat Structure* proceeding, and those we are proposing in the *Earth Station Ownership* proceeding, should enable us to determine whether Comsat's rates are cost-based. If we find that these actions are not sufficient, we may reconsider direct access or take such additional steps as are necessary, pursuant to Title II of the Communications Act of 1934.

IV. *Ordering Clauses*

71. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j) and 403 (1970), that the inquiry into the above-captioned matter is TERMINATED.

72. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

Common Carrier
INTELSAT
Satellite Communications International, Policy re

Commission granted authority to construct and operate international earth stations to provide INTELSATs' International Business Service to area businesses, conditioned on the outcome of the *Notice of Proposed Rulemaking* in Docket No. 82-540.
—*International Relay, Inc.*

FCC 84-125 34388

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of INTERNATIONAL RELAY, INC.	
For Authority to Construct and Operate 11/14, 12/14 International Earth Station Facilities in the vicinity of Chicago, Illinois, Communicating with INTELSAT Atlantic Ocean Region Satellites for the provision of international Business Services	File No. CSG-84-001-P/L
For Authority under Section 214 of the Communications Act of 1934, as Amended, to Establish Channels of Communication Between 11/14, 12/14 GHz Digital International Earth Station Facilities at Chicago, Illinois and INTELSAT Atlantic Ocean Region Satellites for the provision of INTELSAT Business Services	File No. I-T-C-84-001
For Authority to Construct and Operate 11/14, 12/14 International Earth Station Facilities, at Manhattan, New York City Communicating with INTELSAT Atlantic Ocean Region Satellites for the provision of International Business Services	File No. CSG-84-004-P/L

For Authority under Section 214 of the Communications Act of 1934, as Amended, to Establish Channels of Communication Between 11/14, 12/14 GHz Digital International Earth Station Facilities at Manhattan, New York City and INTELSAT Atlantic Ocean Region Satellites for the provision of INTELSAT Business Services	File No. I-T-C-84-024

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted March 30, 1984 Released April 11, 1984

BY THE COMMISSION:

1. We have before us for consideration applications by International Relay, Inc. (IRI) filed pursuant to Sections 214, 304, 308, 309 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 214, 304, 309 and 319 (1983), and Section 201(c)(7) of the Communications Satellite Act of 1962, as amended, 47 U.S.C. Section 721(c)(7)(1983), to construct and operate international earth station facilities, one in the vicinity of Chicago, Illinois and another in the Borough of Manhattan, New York City. Both facilities are to operate with INTELSAT Atlantic Ocean Region (AOR) satellites for provision of International Business Services (IBS) to customers in these areas.

2. On October 4, 1983, IRI filed Title III (File No. CSG-84-001-P/L) and Section 214 (File No. I-T-C-84-001) applications for authority to construct and operate the proposed facility in Chicago, Illinois. The applications were placed on public notice on October 12, 1983. They are unopposed; however, comments were filed by the Communications Satellite Corporation (Comsat) and American Telephone and Telegraph Company (AT&T).[1] IRI filed a response to those comments to which Comsat replied. The pleading period for the applications ended on December 5, 1983.

3. On November 10, 1983, IRI filed Title III (File No. CSG-84-004-P/L) and Section 214 (File No. I-T-C-84-024) applications for authority to construct and operate the proposed facility in the Borough of Manhattan, New York City. The applications were placed on public notice on November 16, 1983. They are also unopposed; however, Comsat filed comments on December 16, 1983. IRI filed a response to those comments to which Comsat replied. The pleading period ended on January 13, 1984.

[1] Comsat requested and was granted an extension of time until November 16, 1983 to file comments on the applications.

4. IRI intends to operate the proposed facilities in conjunction with INTELSAT's recently developed IBS offering. IBS is a flexible, totally digital integrated service designed to accommodate a full range of user applications, including telex, voice, facsimile, data and teleconferencing. INTELSAT has designed the space segment capacity for IBS, unlike its standard capacity, to enable a single transponder to accommodate multiple earth station accesses, including access by a range of small and medium sized antennas. The IBS capacity is further designed to accommodate user networks through a variety of connectivity arrangements. IBS service will be available on a full-time, part-time, and occasional use basis.

I. *Description of the Proposed Facilities*

5. IRI proposes to use a 7.7 meter antenna in the Ku band at each location. The transmit/receive facilities will meet INTELSAT Standard E-3 parameters, and will be operated, initially in the $^{11}/_{14}$ GHz band, with INTELSAT AOR space segments modified for multiple earth station access to IBS. IRI expects to provide IBS in the $^{12}/_{14}$ GHz band when INTELSAT modified spacecraft facilities become operational.[2] IRI states that access to INTELSAT space segment will be made by both facilities using Quadrature Phase - Shift Keying (QPSK) modulated carriers operating on preassigned frequencies within given transponders. IRI anticipates that its proposed facilities will provide access to several data carriers, each at transmission rates dictated by actual market requirements. The standard information rates will be compatible with those proposed in the IBS offering. According to IRI, the Standard E-3 antenna will be capable of direct operation with other INTELSAT Standard E-1, E-2, E-3 and C facilities as well as cross-strapped operation with other INTELSAT Standard A and B facilities.[3]

6. IRI plans to locate the Chicago facility in Skokie, Illinois and the New York City facility on the rooftop of a 12-story building in midtown Manhattan. IRI believes that both site selections afford a clear view of the INTELSAT geosynchronous arc; are accessible only by authorized personnel; are suitably shielded by surrounding man-made structures; and are in close proximity to terrestrial interconnecting facilities. Construc-

[2] INTELSAT is modifying its V-A satellite series to carry the IBS space segment in the $^{12}/_{14}$ GHz band. The V-A satellites are scheduled to be launched in 1985 and will be operational in 1986.

[3] A cross-strapped transponder on the satellite is used in cross-strapped operation to relay the traffic between facilities. A cross-strapped transponder may receive a carrier at 6 GHz and transmit it at 11 GHz, or it may receive a carrier at 14 GHz and transmit it at 4 GHz. Since INTELSAT Standard E-1, E-2, E-3 and C facilities work only in the 14 GHz band and INTELSAT Standard A and B facilities work only in the $^{4}/_{6}$ GHz band, facilities must be capable of cross-strapped operation so that the traffic may be relayed between them.

tion will adhere to local zoning requirements and will be done in accordance with necessary permits. Frequency coordination has been completed.

7. The proposed facilities will be fully redundant with appropriate back up power supplies and deicing equipment. IRI states that the facilities will be attended on an as-needed basis. Both facilities will have monitoring equipment to insure their operation within Commission and INTELSAT specifications and the equipment will report remotely and automatically to other IRI sites (staffed on a continuous basis) in the event of problems. IRI believes that this operational approach will enable it to provide rapid emergency service for the facilities on a seven day a week, 24 hour per day basis without the costs to itself and its customers of keeping full time technicians on the sites.

8. IRI describes its proposals as urban gateway facilities which will make IBS available to large users or a community of small users within a metropolitan area consistent with INTELSAT's "open network" mode for accessing IBS. The facilities are intended to satisfy customized service requirements and are not intended to serve bulk traffic requirements through standard service parameters. IRI believes that several benefits will arise from the proposed facilities: elimination of terrestrial and domestic satellite backhaul costs, including those resulting from construction and implementation delays caused by microwave or domestic satellite backhaul; increased system availability; decreased mean time restoration; improved transmission quality; elimination of double hop transmission delays; and spectrum conservation, by minimizing the need for terrestrial or domestic satellite transmission channels. IRI believes that these reductions in cost and operating efficiencies will both meet unsatisfied user needs and promote use of INTELSAT's IBS offering.

9. IRI recognizes that under current Commission policy now under review in the earth station ownership proceeding, Docket No. 82-540,[4] U.S. international earth stations are jointly owned by Comsat with fifty percent (50%) ownership of each earth station and other U.S. international carriers with the remaining fifty percent (50%) ownership. Comsat serves as manager of each earth station subject to overall control and guidance on basic policy and investment matters by a committee composed of all owners. IRI states that despite current Commission policy and the ongoing earth station ownership proceeding, the Commission has the authority under Section 201(c)(7) of the Communications Satellite Act of 1962 to grant its applications. IRI notes that the Commission in the past has authorized private ownership and management of international earth stations, making the decision on a case-by-case basis when the Commission deemed the arrangement to be in the public interest. IRI then argues

[4] U.S. Earth Stations, 90 FCC 2d 1458 (1982) (Notice of Inquiry; CC Docket No. 82-540).

that its applications are in the public interest, because its proposals will implement the new IBS system in the United States and also promote competition.

10. In addition, IRI states that there are no operational impediments to the Commission granting IRI's applications for either facility. IRI believes its applications are consistent with INTELSAT's IBS offering, and notes that INTELSAT already has policies and procedures developed to coordinate the access of multiple earth stations to the IBS space segment. These procedures, IRI believes, establish a framework to prevent spurious or inadvertent emissions, or co-channel interference during simultaneous access. Thus, IRI states, INTELSAT's coordination procedures are adequate and should not hold up the granting of IRI's earth station applications.

11. On the other hand, if the Commission wishes to defer a decision on its applications until after the rulemaking proceeding, IRI requests that it be granted developmental authorization under rule 25.390(k) to construct and operate its proposed earth stations. IRI states that the Commission developmental authorization policy is designed to promote programs that test services in the marketplace as well as experimental projects. Since IRI's proposals will implement a new service, IBS, and will test its economic viability and its marketability along with other technical and operational features, IRI believes its applications should be granted developmental authorization.

12. IRI also proposes that Comsat be its Operations Representative (OR) to INTELSAT. IRI, however, states that Comsat is a self-interested party because it will be competing with other carriers in the IBS market. Therefore, IRI suggests that in the future the Commission replace Comsat as OR with a more impartial representative.

II. *The Pleadings*

13. In its comments, Comsat supports IRI's applications and believes that they are positive steps in implementing IBS. Comsat, however, contends that the Commission should develop a structured framework for disposition of applications for IBS facilities. Comsat states that the authorization of too many earth stations in one geographic area or in too few markets may inhibit the efficient use of IBS capacity to effectively serve all areas in the United States. Comsat further notes that this consideration need not interfere with the authorization of the initial earth stations, but believes that the framework should be designed to integrate these facilities in the future.

14. In addition, Comsat states that while it supports IRI's applications, it assumes that all applications for IBS earth stations will receive equal treatment and that both wholesale and retail facilities will be allowed to enter the market. Comsat suggests three areas in which all

applications should be treated equally. First, Comsat proposes that all applications should be either deferred pending the earth station ownership proceeding or expeditiously processed. Second, Comsat suggests that all facilities should be limited to providing only IBS service. Comsat believes that this type of restriction is necessary to guarantee that these stations do not become general purpose stations and create serious coordination problems in the INTELSAT system. Third, Comsat contends that all applicants should be subject to the Part 25 procurement rules. Furthermore, Comsat proposes that all applicants should be required to construct the facility and initiate service within a specified time period as a condition to the grant of a license. Comsat believes that this condition would ensure serious intentions on the part of the applicants and prompt service to the public. Moreover, Comsat believes it can continue to adequately represent the U.S. earth station owners before INTELSAT. Comsat notes that it has been the Operational Representative for the U.S. system for two decades, and in that time it has developed an expertise in working with INTELSAT and other Operational Representatives which will be useful to the U.S. earth station owners.

15. AT&T filed a letter commenting on IRI's Chicago applications. AT&T believes that any decision on IRI's applications should be deferred until the earth station ownership proceeding is finished.

16. In response, IRI states that IBS applications may raise separate issues and should not necessarily be treated equally. As an example, IRI contends that Comsat's applications to construct and operate an IBS earth station at the New York Teleport complex raise problems not posed by its applications.[5] First, IRI argues that Comsat is still a rate-base regulated entity, and therefore the Commission must insure that any investment in IBS facilities is justified and will not burden Comsat's ratepayers with unnecessary costs. Next, IRI argues that Comsat's proposal for a "wholesale/retail" combination facility raises inherent conflicts of interest because Comsat is a wholesaler of INTELSAT satellite capacity and the U.S. Signatory, and will also become a retailer. Finally, IRI contends that Comsat's proposal conflicts with the Commission current policy stated in *Authorized User II*. Thus, IRI concludes that its applications do not raise the same issues as Comsat's "Teleport" proposal and should be considered independently. Moreover, IRI claims that according to the *Execunet* decision,[6] the Commission may only impose restrictions on the grant of a license when it finds the restriction to be in the public interest, and imposes the restriction at the time it grants the license. IRI states, in

[5] Applications of Communications Satellite Corporation, File Nos. CSG-83-034-P/L, I-P-C-83-067 (July 19, 1983) ("New York Teleport Application").

[6] MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1980).

conclusion, that although problems may arise in other U.S. earth station applications, there are no such problems in its applications, and requests that the Commission grant it authority to construct and operate the proposed earth stations in the Chicago and Manhattan metropolitan areas.

III. *Discussion*

17. IBS is designed to provide a wide range of information services quickly to a large user or a community of small users in a metropolitan area. INTELSAT anticipates that with IBS, carriers will be able to establish for their customers dedicated international communications networks using earth stations located at or near the customer's premise to carry digital communication services, including video conferencing, facsimile and highspeed data transfers. In a companion order adopted today, we are authorizing Comsat's application to provide the international space segment of INTELSAT's international business service to the U.S. earth stations. We believe that the public interest also will be served by our granting IRI's applications to construct and operate earth stations with which to access Comsat's new INTELSAT service.

18. Further, to the extent that the grant of these applications is inconsistent with the earth station ownership policy set forth in *Ownership and Operation of Earth Stations*, 5 FCC 2d 812 (1966), we hereby waive the application of that policy. The principal consideration which militated against our permitting individual carrier ownership of U.S. earth stations operating with INTELSAT space segments was that

> . . .it would tend to fragment responsibility for, and control of, what must be a unified system at this stage of development of the art when a proliferation of earth stations is neither technically nor economically feasible.

5 FCC 2d at 815. The IBS space segment, however, is expressly designed to access multiple earth stations and to accommodate user networks through a variety of connectivity arrangements. Thus, because IBS is technically and economically designed as a state of the art service capable of supporting a proliferation of independently operated earth stations, authorizing IRI to construct and operate IBS earth stations in Chicago and New York does not raise the same concerns about fragmentation of responsibility and control that prompted our 1966 decision to adopt restrictions against U.S. carriers' individual ownership of U.S. INTELSAT earth stations. Authorization of these applications, however, will be subject to any restrictions on the operation of these stations that may be adopted pursuant to our Notice of Proposed Rulemaking in CC Docket No. 82-540.[7] We will also require IRI's IBS earth stations to comply with

[7] In Docket 82-540 we are proposing to adopt a new international earth station ownership policy. Comsat's preliminary comments in response to our Notice of Inquiry in that docket, 90 FCC 2d 1458 (1982), confirm our view that independent carrier ownership of IBS earth stations does not raise the same issues as raised by multipurpose earth

the performance criteria developed by INTELSAT for IBS earth stations operating with INTELSAT satellites.

19. In addition, in the NPRM, we reject Comsat's proposal for a structured framework for the disposition of applications for IBS facilities. Although Comsat believes that a structured system is necessary to ensure maximum efficiency in IBS, in the NPRM, we find that there is no need for a restrictive plan for granting applications at this time. We believe that the use of IBS capacity should be based upon demand and not some predetermined or otherwise restrictive plan. We see such a plan as inherently anticompetitive.

20. As stated in the NPRM, we will consider the legal (character and citizenship), financial (ability to meet the costs of construction and operation) and technical (station location, desired frequencies and types of equipment, mode of operation, etc.) qualifications of each applicant before granting the application. We will also review the frequency coordination and require adherence to the National Environmental Policy Act of 1969, 42 U.S.C. Section 4321 *et seq.* (1980).[8] *See* 47 CFR Section 1.1301-1.1319 (1983). However, we will treat the applications as routine and review and process them as quickly as possible, unless there are special problems with an application.

21. In this case, IRI meets the legal, financial and technical requirements for IBS earth station ownership. IRI was incorporated in the U.S. and is wholly owned by SATCOM, a U.S. corporation.[9] Moreover, IRI is an authorized international carrier providing channels of communication between the U.S. and the U.K.[10] IRI also demonstrates in its applications that it has the financial resources necessary to construct and operate its earth stations. It states that it has joined with M/A-COM, Inc., for the purpose of undertaking this venture and will rely on capital funds provided by M/A-COM and anticipated earnings to support its proposed services.[11] We find that this commitment, coupled with shareholder paid in

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stations. Among the tentative conclusions reached in the Notice is that the unique technical characteristics of the IBS offering remove any need for us to evaluate the impact of multiple IBS earth stations on the INTELSAT system.

[8] IRI proposes to construct 7.7 meter antennas at both locations which does not constitute a major action under Commission rules. 47 CFR Section 1.1305 (a)(5) (1983).

[9] Foreign entities do own some interest in SATCOM, but their interest does not exceed the permissible levels set forth in Section 310(b) of the Communications Act of 1934, 47 U.S.C. Section 310(b) (1980).

[10] International Relay, Inc., 77 FCC 2d 819 (1980), *on reconsideration*, 82 FCC 2d 41 (1980).

[11] IRI states that M/A-COM, Inc. has agreed to provide funds totalling $450,000 as part of its investment participation in SATCOM, Inc. This amount represents $50,000 in paid-in capital and $400,000 in loans repayable after 4 years, unless converted at M/A-COM's option into equity. The remainder of the earth station construction costs will be financed through additional outside financing in the form of loans, additional equity, leases or deferred installment payments, which are fairly standard in the earth station industry.

capital and loan commitments is more than adequate to support the acquisition and initial operation of the facilities. Based on these findings, we conclude that the applicant has the basic qualifications to provide the proposed IBS service.

22. As part of our evaluation of the applications for new entrants, normally, we must determine whether competition in the market is reasonably feasible and whether added competition is in the public interest. *FCC v RCA Communications, Inc.*, 346 U.S. 86 (1953). Competition is reasonably feasible when there is a reasonable expectation that competition will have some beneficial effect, such as maintaining a good service or improving a service. As interpreted by the Commission, "feasibility of competition depends on whether there is sufficient traffic to support the addition of another competing direct circuit and upon the effect of opening such circuit upon the applicant as well as all other carriers providing service to the public." *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960). In determining whether added competition is in the public interest, "the Commission is not required to make specific findings of tangible benefit. . .but the Commission must at least warrant. . .that competition would serve some beneficial purpose such as maintaining good service and improving it." 346 U.S. at 96-7.

23. IBS is a new service offering. As such, there is no traffic history upon which to make a finding as to feasibility of competition. However, as we have stated, INTELSAT has developed IBS to allow multiple earth station access to IBS space segment. This concept is consistent with and, we believe, will flourish under a policy permitting competitive earth stations. In addition, we believe that IRI's provision of IBS services will be in the public interest. Today, in authorizing Comsat to participate in INTELSAT's IBS program, we find that IBS will provide business customers with a wide array of international services tailored to their needs, and will allow such customers to establish their own international digital networks. IRI seeks to become an initial provider of IBS service. No party opposes IRI's applications. IRI shows specific benefits that will result from its provision of IBS services, i.e. the elimination of terrestrial and domestic satellite backhaul costs; increased system availability; decreased mean time restoration; improved transmission quality; and elimination of double hop transmission delays. In addition, we find IRI's proposals to be consistent with previous Commission decisions favoring the introduction of new and innovative international services.[12] In sum,

[12] *See, e.g.*, RCA Global Communications *et al.*, 88 FCC 2d 911 (1982); Satellite Business Systems, 91 FCC 2d 941 (1982); Western Union Telegraph Co., 91 FCC 2d 1051 (1982); GTE Telenet Communications Corp., Mimeo No. 2765 (released March 15, 1982) and Tymnet, Inc., Mimeo No. 3223 (released April 8, 1982), *aff'd on application for review,*

we believe that IRI's applications meet the requirements of *RCA Communications, Inc.*, and their approval will serve the public interest.

24. In addition, we conclude that it is unnecessary to defer action on any application to construct and operate IBS stations until the outcome of Docket No. 82-540 as AT&T contends.[13] IRI's applications for the Chicago and Manhattan facilities are fully consistent with INTELSAT's IBS program, meet INTELSAT's performance standards for IBS stations, and have been frequency coordinated. IRI states that it could commence service within 16-20 weeks of the grant of authority by the Commission which would facilitate the provision of IBS at the earliest possible date. INTELSAT is already providing IBS between Canada and the United Kingdom. We believe that it is in the public interest for U.S. businesses to obtain IBS services as soon as possible. In view of these factors, we conclude that IRI's applications should be granted at this time.[14] We, however, condition the grant of authority on the outcome of the NRPM as it may apply to IBS earth stations. IRI's acceptance of authority to build and operate the earth stations is therefore at its own risk. We also retain jurisdiction to later modify IRI's earth station licenses to restrict their operation depending on the outcome of Docket No. 82-540.[15] This question will be considered in Docket No. 82-540 but should not delay IRI's provision of IBS.

25. In its applications, IRI proposes that Comsat be replaced in the future as Operational Representative (OR) to INTELSAT, because IRI believes a conflict of interest will develop since Comsat will compete with other IBS carriers. Comsat argues, on the other hand, that it has developed an expertise in working with INTELSAT during the past two decades, and this experience will be invaluable in future dealings with INTELSAT. Thus, Comsat believes it could continue to adequately represent the U.S. earth station owners before INTELSAT and should remain as OR. This issue is discussed in the NPRM, Docket No. 82-540. In

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Computer II International, FCC No. 82-377 (released August 25, 1982); Argo Communications Corp., Mimeo No. 1723 (released January 10, 1984).

[13] AT&T claims that the grant of these applications would cloud the earth station ownership proceeding, give selective carriers a head start, and result in the piecemeal establishment of ownership policy; but it does not state any supporting arguments for its conclusions. We believe that AT&T's contentions are adequately addressed above.

[14] We also are granting Comsat's applications today to build an earth station at the Staten Island Teleport Complex in New York to provide IBS service. (File Nos. SCG-83-034-P/L, I-P-C-83-067, July 19, 1983). Comsat proposes to operate the station as a wholesale/retail combination station serving retail carriers.

[15] The Commission has previously found it necessary to condition the grant of applications on the outcome of a rulemaking proceeding. *See, e.g.*, Lincoln Telephone and Telegraph Co. v. FCC, 659 F.2d 1092 (D.C. Cir. 1981); RCA American Communications, Inc., 72 FCC 2d 473 (1979); ASN, Inc., 71 FCC 2d 1342 (1979); American TV and Communications Corp., *et al.*, 70 FCC 2d 2175 (1978); United Video, Inc., *et al.*, 69 FCC 2d 1629 (1978).

the NPRM, we tentatively conclude that Comsat is in the best position to represent the United States at INTELSAT meetings; and, we request comments on establishing a mechanism for greater carrier and earth station operator participation that would not be disruptive to a cohesive U.S. role in INTELSAT.

26. Finally, IRI must adhere to our existing satellite procurement rules. The plain language of the rules makes them applicable to both Comsat and other carriers procuring earth station equipment and services. However, today we are also issuing a Notice of Proposed Rulemaking on the continued need for the Part 25 procurement rules. We tentatively conclude that procurement of the earth station equipment and services can be accomplished through increased reliance on marketplace forces, and we request comments on their elimination or limited applicability to Comsat and AT&T.

27. Upon consideration of the applications, we find that authorization of the requested services and facilities is required by the public convenience and necessity.

28. Accordingly, IT IS ORDERED, pursuant to Sections 214(a) and 214(c), 304, 308, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File Nos. I-T-C-84-001; CSG-84-001-P/L and I-T-C-84-024; CSG-84-004-P/L are GRANTED, and International Relay, Inc. is authorized to construct and operate the proposed earth stations in the vicinity of Chicago, Illinois and at Manhattan, New York City, and to lease from Comsat channels of communication between these facilities and appropriate INTELSAT Atlantic Ocean Region satellites for the provision of INTELSAT Business Services to the United Kingdom, Switzerland and the Federal Republic of Germany, and beyond.[16] Before completion of the equipment installation and facility activation, however, IRI should provide to the Commission a summary of actual installed equipment.

29. IT IS FURTHER ORDERED, that the applications are granted subject to the following: The authorization of the facilities and services herein shall be subject to possible modification as a result of any findings, rules, requirements or other actions which may result from or be promulgated by, the proceedings in Common Carrier Docket No. 82-540, "U.S. Earth Stations," 97 FCC 2d ____ (1984), Mimeo No. 34406 (released: ____, 1984). The grantee is afforded 30 days from the release of this order to decline this authorization as conditioned. Failure to respond within this period will constitute formal acceptance of the authorization as conditioned.

[16] The authorization is not to be construed as permitting provision of IBS between earth stations located within the United States.

30. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

31. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

32. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between IRI and its correspondents in the United Kingdom, Switzerland and the Federal Republic of Germany, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

Developmental Authorization
Domestic Public Land Mobile Radio Service
Domestic Public Land Mobile Radio Service, Authorization
Due Process
Prejudice
Public Notice

Application for review of grant of developmental authority to MCI Cellular Telephone Company to conduct field strength tests in Pittsburgh denied. Argument rejected that competitors were denied due process when Common Carrier Bureau failed to place application on public notice. Applications for field strength tests are not subject to public notice requirements.
—*MCI Cellular Teleph. Co.*

FCC 84-53

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
MCI CELLULAR TELEPHONE COMPANY	File No. 26111-CL-P-(14)-82
CELCOM COMMUNICATIONS CORPORATION OF PITTSBURGH	File No. 26157-CL-P-(11)-82
CELLULAR MOBILE SYSTEMS OF PENNSYLVANIA, INC.	File No. 26184-CL-P-(16)-82
For authority to establish a cellular mobile communications system at Pittsburgh, Pennsylvania	CC Docket No. 82-796

MEMORANDUM OPINION AND ORDER

Adopted February 23, 1984; Released February 24, 1984

BY THE COMMISSION:

1. Cellular Mobile Systems of Pennsylvania, Inc. (Cellular Mobile) has submitted an application for review of action taken by the Common Carrier Bureau (Bureau), granting developmental authority to MCI

Cellular Telephone Company (MCI) to conduct a propagation analysis and field strength test on nonwireline cellular frequencies in Pittsburgh pursuant to delegated authority. Responsive pleadings have been filed. Because the Bureau's action was proper, we deny review.

2. On July 29, 1983, the presiding Administrative Law Judge issued an Initial Decision on the competing applications for the Pittsburgh market, selecting the MCI application and denying the applications of Cellular Mobile and Celcom Communications Corporation of Pittsburgh (Celcom).[1] By letter dated August 9, 1983, MCI requested authority to test the validity of its proposed propagation pattern on the nonwireline frequencies at or near the sites identified on MCI's application. In the letter, MCI stated that it would undertake the test program at its own risk and without prejudice to any further action by the Commission. On August 18, 1983, the Bureau, by its Mobile Services Division, granted MCI limited developmental testing authority.[2]

3. Cellular Mobile argues that the Bureau's action was improper for the following reasons: (1) that MCI failed to set out the statutory or regulatory basis for its request, pursuant to Section 1.41 of the rules;[3] (2) that the Bureau failed to place MCI's application on public notice and wait 30 days before taking action; (3) that fundamental fairness requires Cellular Mobile be given an opportunity to be heard; (4) that the tests establish MCI as an incumbent in the market, thereby prejudicing the Commission's decision; and (5) that the grant of the test authority demonstrates that the Bureau is biased in favor of MCI. Cellular Mobile argues that because of this alleged predisposition in favor of MCI, the Common Carrier Bureau should be disqualified from a decision-making role with respect to the pending exceptions from the Initial Decision.

Discussion

4. We reject Cellular Mobile's argument that MCI's application failed to adhere to the requirements of Section 1.41 of the rules, which requires applicant to set forth the statutory or regulatory basis for an application. Although MCI did not cite a specific rule section as the basis for its request, its letter of August 9 made clear that MCI wished to conduct field strength tests relative to its Pittsburgh cellular proposal. The nature of

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[1] MCI Cellular Telephone Co., FCC 83D-43, released July 29, 1983.

[2] The Bureau limited the authority to a six month period, and requested a developmental report, pursuant to Section 22.404(a) and (e) of the rules. The Bureau further cautioned MCI that the tests would be taken at MCI's own risk and the program would not be considered in the Commission's comparative evaluation of the applicants.

[3] Section 1.41 states that informal requests for Commission action shall set forth "clearly and concisely" the relevant facts, the relief requested, the interest of the requesting party, and the statutory and regulatory provisions on which the request is made. The rules permit informal applications to be filed in letter form. *See* Section 22.5(c).

their request leaves no room for doubt that MCI was requesting a developmental authorization pursuant to Section 22.401(a).[4] The staff's letter authorizing test authority cites the subpart of the rules governing developmental authorizations as the basis for the grant. Cellular Mobile's complaint that the basis for the authorization is unclear is therefore without merit.[5]

5. Cellular Mobile's public notice argument is also unpersuasive. A request for authority to conduct field strength tests that will not entail the provision of any communications service to others is not subject to the public notice provision of 47 U.S.C. §309(b), because it does not involve an application for an instrument of authorization for common carrier service.[6] An essential element of any common carrier service is the provision of communications capacity to others for hire.[7] When, as here, the requested authorization does not involve any more than technical testing and specifically excludes the establishment of facilities to be used for provision of a communications service to others, the public notice provisions of the Act relating to common carrier authorizations clearly does not come into play.

6. Based on the above analysis, we additionally find that Section 22.27 of the rules, which codifies the public notice requirements of 47 U.S.C. §309(b), should not be interpreted to apply to requests for developmental authority made under Subpart F of Part 22 where no service will be

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[4] Section 22.401(a) provides that developmental authorizations may be issued for:

> Field strength surveys relative to or precedent to the filing of applications for construction permits, in connection with the location of suitable locations for stations proposed to be established in any of the regularly established radio services regulated by the rules of this part.

[5] We also reject Cellular Mobile's assertion that MCI's application is defective because it failed to set forth in detail the duration, date and time of the field strength survey. The Part 22 developmental rules do not contain detailed requirements regarding field strength surveys. The provisions of Part 5 do require certain details, however. *See* 47 C.F.R. §5.254(a) (recodified at Section 5.205(a) by Report and Order in Gen. Docket 82-469, Amendment of Part 5, 48 Fed. Reg. 52733 (1983)). In view of the similar purpose of the Part 22 developmental rules and the Part 5 rules, we will require MCI to supply the information that would be required by the present Subpart E of Part 5. We caution MCI that it is responsible for furnishing this information to the FCC's Engineer in Charge of the relevant radio district. MCI will, furthermore, be required to comply with all other applicable requirements of Part 5.

[6] Section 309(b) requires a thirty-day public notice period for any application "for an instrument of authorization in the case of a station in the . . . common carrier services."

[7] Section 3(h) of the Act, 47 U.S.C. §153(h). *See* 47 U.S.C. §201(a); NARUC v. FCC, 525 F. 2d 630, 640-45 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976); Computer and Communications Industry Association v. FCC, 693 F. 2d 198, 209-10 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983).

provided to the public.[8] Because no service to the public will be authorized and no permanent facilities constructed, public notice of such request would serve no beneficial purpose. Indeed, such requests would ordinarily not be expected to generate public comment. This interpretation of the rule is consistent with the Common Carrier Bureau's past practice in granting authority for field strength tests and is also consistent with similar provisions for experimental authority contained in Part 5. *See* C.F.R. §§ 5.202-203.[9] Moreover, we note that all parties to the Pittsburgh non-wireline cellular proceeding were served with copies of MCI's letter requesting authority for field strength tests. Because Cellular Mobile received notice of the filing and in fact submitted a letter opposing MCI's request,[10] it is not adversely affected by any lack of public notice. We therefore reject Cellular Mobile's argument that the Bureau's action in granting MCI developmental authority without public notice was improper.

7. We recognize, however, that Section 22.27 of the rules does not explicitly exclude requests for developmental authority from its public notice requirements. We intend to issue a separate order to amend Section 22.27(a) to make clear that the public notice requirement does not extend to requests for developmental authority to conduct field strength tests, where no service is to be offered to the public. The amendment will codify our interpretation of the rule and bring the developmental provisions of Part 22 into explicit conformance with the experimental provisions of Part 5.

8. We also reject Cellular Mobile's argument that the grant of developmental authority prejudices the Commission's review of the Initial Decision. Contrary to the suggestion of Cellular Mobile, the developmental authorization granted to MCI is not comparable to a grant of interim authorization to one of several parties to a comparative hearing, which the court criticized in *Community Broadcasting Co. v. FCC*, F. 2d 753 (D.C. Cir. 1960). Unlike the temporary or interim authorization involved in *Community*, MCI's authorization does not permit construction of expensive fixed facilities or the provision of service to the public. Rather, MCI has merely been granted permission to test the validity of its engineering proposals. The equipment to be employed in the test is portable and the authorization is temporary. Furthermore, in *Community* the temporary

[8] Section 22.27(a) provides that applications, major amendments and significant Commission action shall be placed on public notice. Section 22.27(c) lists exceptions to the general rule, but does not include an exception for requests for developmental authority. The term "applications," as it is used in Section 22.27(a), is clearly intended to mean applications for the provision of common carrier service.

[9] These provisions, formerly contained in §§ 5.252-5.253, were revised and recodified in the Report and Order in Gen. Docket 82-469, Amendment of Part 5, 48 Fed. Reg. 52733 (1983).

[10] *See* Letter to Chief, Mobile Services Division, dated August 19, 1983.

authorization was exclusive: only one of the competing applicants would be granted interim authority. Here, however, the grant was non-exclusive, and any applicant is free to request similar authority. Grant of developmental test authority is given on the condition that tests are undertaken at the applicant's own risk and will not prejudice the Commission's comparative evaluation of the applicant. We fail to see how the Commission will be prejudiced in its final decision simply because one applicant conducts field strength measurements.

9. Likewise, the Bureau's decision to allow the tests does not demonstrate that the Bureau is biased in favor of MCI. Any applicant who is legally and otherwise qualified may be authorized to conduct field strength surveys prior to the grant of a construction permit. Thus, Cellular Mobile is free to apply for similar authorization, if it so chooses.[11] We therefore find that the Bureau should not be disqualified from its decision-making role.[12]

10. In view of our findings, above, we reject Cellular Mobile's request that the Bureau's decision to authorize the tests be reversed and that the Bureau staff be isolated from future decision-making regarding the nonwireline cellular applicants for the Pittsburgh SMSA.

11. Accordingly, IT IS ORDERED, That the application for review filed by Cellular Mobile Systems of Pennsylvania, Inc. is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

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[11] In addition, Section 22.404(e) provides:

> The grant of a developmental authorization carries with it no assurance that the developmental program, if successful, will be authorized on a permanent basis . . . .

[12] MCI urges the Commission to dismiss Cellular Mobile's application for review as an untimely filed pleading in the Pittsburgh proceeding. We decline to characterize the pleadings in the manner MCI has requested. In addition, we find that resolution of the test authority issue is important to the prompt and expeditious development of cellular radio generally.

Competition
Mobile Radio Service
Paging Service

Memorandum Opinion and Order adopted denying Application for Review of Common Carrier Bureau Order which held that 900 MHz local frequency licensees may provide wide-area or network paging so long as they provide local paging service on these non-network frequencies.
—*Metromedia Telecommunications, Inc.*

FCC 84-24

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
METROMEDIA TELECOMMUNICATIONS, INC.	
For authority to establish one-way facilities to operate on frequency 931.8625 MHz at Buffalo, New York; Chicago, Illinois; Houston, Texas; and Rochester, New York	File Nos. 20771-CD-P-1-83 20698-CD-P-1-83 20755-CD-P-1-83 20711-CD-P-1-83
SOUTHWIDE MOBILE TELEPHONE COMPANY	
For authority to establish one-way facilities to operate on a common frequency in the band 931.0125 to 931.9875 MHz at Baton Rouge, Louisiana; Dallas, Texas; Miami, Florida; and Milwaukee, Wisconsin	File Nos. 23019-CD-P-1-83 23020-CD-P-1-83 23007-CD-P-1-83 23054-CD-P-1-83
AMERICAN RADIO COMMUNICATIONS CO., LTD.	
For authority to establish one-way facilities to operate on a common frequency in the band 931.0125 to 931.9875 MHz at Austin, Texas; Dallas, Texas; El Paso, Texas; and San Antonio, Texas	File Nos. 23306-CD-P-1-83 23312-CD-P-1-83 23307-CD-P-1-83 23310-CD-P-1-83

COMSTAR, INC.	
For authority to establish one-way facilities to operate on a common frequency in the band 931.0125 to 931.9875 MHz at Chicago, Illinois; Cleveland, Ohio; San Francisco, California; and Washington, D.C.	File Nos. 22700-CD-P-1-83 22172-CD-P-1-83 22183-CD-P-1-83 22249-CD-P-1-83
MILLICOM INFORMATION SERVICES, INC.	
For authority to establish one-way facilities to operate on a common frequency in the band 931.0125 to 931.9875 MHz in Dallas, Texas; Memphis, Tennessee; Miami, Florida; and San Antonio, Texas	File Nos. 23593-CD-P-1-83 23594-CD-P-1-83 23595-CD-P-1-83 23596-CD-P-1-83
RADIOFONE, INC.	
For authority to establish one-way facilities to operate on a common frequency in the band 931.0125 to 931.9875 MHz at Dallas, Texas; Jacksonville, Florida; Mobile, Alabama; and San Antonio, Texas	File Nos. 23263-CD-P-1-83 23291-CD-P-1-83 23249-CD-P-1-83 23231-CD-P-1-83
LEADER COMMUNICATIONS, INC.	
For authority to establish one-way facilities to operate on a common frequency in the band 931.0125 to 931.9875 MHz at Buffalo, New York; Chicago, Illinois; Little Rock, Arkansas; and Memphis, Tennessee	File Nos. 22991-CD-P-1-83 22894-CD-P-1-83 22988-CD-P-1-83 22944-CD-P-1-83

Memorandum Opinion And Order

Adopted January 19, 1984; Released February 2, 1984

By The Commission:

1. Before the Commission is an Application for Review filed by Mobile Communications Corporation of America (MCCA), requesting review of the decision of the Common Carrier Bureau, which denied MCCA's petitions to deny 28 applications for 900 MHz one-way paging stations filed by the seven captioned applicants.[1] All of the applicants, with the exception of Southwide Telephone Company, filed responsive pleadings.

[1] Metromedia Telecommunications, Inc., CC Mimeo No. 4634, released June 10, 1983. (hereinafter "Order").

2. In *Paging Systems-DPLMRS*, 89 FCC 2d 1337, *modified*, 52 RR 2d 985 (1982), the Commission allocated 40 common carrier paging channels in the 900 MHz frequency band. Three of these channels were reserved for nationwide network paging, while the remaining 37 were designated local for "non-network" paging.[2] Between December 1, 1982, and January 30, 1983, approximately 2,700 applications were filed requesting authorization to construct and operate on the non-network 900 MHz frequencies in various markets around the country. Some of the applicants requested a common frequency assignment for all of their applications.[3] MCCA petitioned the applications of seven captioned applicants who requested a common frequency in multiple locations. MCCA argued that the grant of a common frequency to these applicants would not be in the public interest because the frequency might be used to provide nationwide network, rather than local, paging service. MCCA requested that the Commission prohibit use of the local 900 MHz paging frequencies for network paging.

3. In its *Order* the Bureau refused to grant MCCA the relief it sought and denied its petitions. The Bureau stated that the Commission did not restrict the paging services that can be offered on local 900 MHz paging channels and that, while such facilities must provide local services, licensees are not required to use the facilities *exclusively* for local paging. *Order*, at para. 7.

4. In its Application for Review, MCCA argues that the Bureau's decision is in conflict with the Commission's established licensing policies for 900 MHz paging frequencies; and that the decision is unreasonable and arbitrary, because it permits like services to be regulated unequally. Specifically, MCCA refers to the Commission's preemption of state authority over nationwide network frequencies but not the local non-network frequencies. The parties opposing MCCA's pleading argue that the Bureau accurately stated the Commission's pronouncement in this proceeding regarding use of the 900 MHz local frequencies. They argue further that there are obvious distinctions between the services to be offered on the network and non-network frequencies so that disparate regulatory policies are justified.

5. Upon consideration of the Bureau's *Order* and the pleadings filed here, we find no basis to grant review the Application for Review. MCCA has provided nothing more than conjecture and unsupported conclusory objections that if the applicants are granted common frequency assignments, they will use those frequencies to provide interstate, network

[2] "Non-network" are those frequencies that are not reserved for nationwide paging. Paging Systems-DPLMRS, *supra*, at note 32.

[3] In Paging Systems-DPLMRS, *supra*, at para. 49, we indicated that each applicant could state a frequency preference and the staff would make a reasonable effort to assign that frequency to the applicant.

paging service.[4] In addition, our existing paging frequencies do not have a restriction against wide area or network usage, and MCCA has failed to demonstrate why such services should be prohibited on the new 900 MHz frequencies. Thus, MCCA has failed to make a *prima facie* showing that the public interest, as opposed to MCCA's private interests, would be harmed if the Commission does not restrict the potential uses of these non-network frequencies.[5]

6. MCCA argues that the Commission's policy of allowing common frequency assignments on non-network frequencies will lead to "disparate treatment of like services."[6] We reject this argument. The network channels must be used for nationwide paging service,[7] while the remaining paging channels must be used to provide local service, without restrictions concerning regional or nationwide paging service.[8] Second, we developed our regulatory policies for nationwide network paging systems in order to ensure the establishment and development of this new communications service. Any responsibilities and benefits of network carriers that are different from those of non-network licensees are the result of our policy promoting this service and, thus, justifiable.[9]

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[4] We note that in response to MCCA's pleadings, which presume that the applicants will provide a nationwide paging service, at least one applicant–Metromedia–has explained that its reasons for seeking a common frequency were set forth in Exhibit C to its Buffalo application: maximizing interchangeability of pagers, facilitating efficient maintenance, and promoting operating efficiency. Because Metromedia is under a duty to be candid with the Commission, and no reason to question the truth of this representation has been given, MCCA's allegations against Metromedia were obviously lacking in substance from the outset of this controversy.

[5] It is settled that the Commission cannot impose restrictions on services that may be offered over a communications line, unless it has affirmatively determined that the public convenience and necessity so require. *See* MCI Telecommunications v. FCC, 561 F. 2d 365, 377 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 980 (1978).

[6] MCCA, Application for Review, at p. 6.

[7] We point out that MCCA is a partner in National Satellite Paging, Inc. (NSP), an applicant for one of the three nationwide network channels that filed a petition to deny several applications of network organizers. NSP argues that the applications should be dismissed because these parties have local paging applications on file which, NSP alleges, will be used for network services. We will resolve this issue when we resolve the petitions; however, we emphasize here that the non-network channels should be utilized for local service.

[8] In Nationwide Paging Service (DPLMRS), 53 RR 2d 1238 (1983), at para. 17, we recognized that non-network channels can be utilized to provide regional and wide-area paging service and that such service augments both local and nationwide paging services.

[9] American Paging, Inc., a non-party to this proceeding, filed an informal comment which raises the issue of whether the Commission should liberalize the rules with respect to local service on the network frequencies. We deny this request because it is beyond the scope of this proceeding, and because this question should have been raised in a petition for reconsideration of Paging Systems-DPLMRS, *supra*, and not in the context of pleadings to non-network paging applications.

7. Accordingly, IT IS ORDERED, that the Application for Review filed by Mobile Communications Corporation of America IS DENIED.

8. IT IS FURTHER ORDERED, that the Motion for Acceptance of Additional Pleading filed by Mobile Communications Corporation of America IS GRANTED, and the Motions to Strike filed by Radiofone, Inc. and Metromedia Telecommunications, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

CATV Cross Ownership by B/cer
Divestiture
Ownership Multiple
Petition for Special Relies

Petition for issuance of Order to Show Cause, Declaratory Ruling, and/or other appropriate relief of an agreement between Chris-Craft Industries, Inc. and Warner Communications, Inc. granted to an extent and otherwise denied. Commission requested joint report on divestment problem and concluded that public interest does not require further action at this time.
—*News International, PLC*

FCC 84-79

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re:

NEWS INTERNATIONAL, PLC

Petitions for Relief

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 1984; Released: March 8, 1984

BY THE COMMISSION:

Introduction

1. On January 4, 1984, News International, plc ("News International"), filed a "Petition for Expedited Temporary Relief" and a "Petition for Issuance of an Order to Show Cause, Declaratory Ruling, and/or Other Appropriate Relief," which was supplemented on January 9, 1984. These petitions seek our review of an agreement, described below, between Chris-Craft Industries, Inc. ("Chris-Craft") and Warner Communications, Inc. ("Warner"). Warner and Chris-Craft filed a joint opposition on January 10, 1984. News International filed replies on January 13, 1984, as to its temporary relief petition, and on January 17, supplemented on January 26, 1984, as to its show cause petition. Finally, on January 23, 1984, News International filed an "Emergency Petition for Issuance of an Order to Restore the Status Quo Ante," which was opposed by Warner

and Chris-Craft on January 30, 1984.[1]

Background

2. *The Parties.* News International, along with its parent, The News Corporation, Ltd., control, among others, two daily newspapers published in San Antonio, Texas, *The San Antonio Express* and *The San Antonio News.* Further, when this proceeding began, News International owned seven percent of Warner's voting stock. This minority interest is the stated basis for News International's concern about the Chris-Craft/ Warner agreement. Further, on December 30, 1983, News International filed a premerger notification with the Antitrust Division of the Justice Department and with the Federal Trade Commission stating an intention to acquire up to 49.9 percent of Warner's stock.[2]

3. Chris-Craft, through its subsidiary, BHC, Inc. ("BHC"), controls the licensees of one UHF and five VHF television stations. Three of the VHF stations are relevant here: KCOP(TV), Los Angeles, California; KPTV(TV), Portland, Oregon; and KMOL-TV, San Antonio, Texas.[3]

4. Warner and American Express Company ("American Express") each own 50 percent of Warner Amex Cable Communications, Inc. ("Warner Amex"). Warner Amex owns numerous cable television systems throughout the United States, reaching a total of 1,260,000 subscribers.[4] When this proceeding began, five of Warner Amex's systems were within the grade B contour of station KCOP(TV) and another five were within the Grade B contour of station KPTV(TV).

5. *The Agreement.* Prior to the consummation of the Chris-Craft/ Warner agreement on January 18, 1984, Chris-Craft owned all of the shares of BHC. Under the agreement, Warner received 143,750 shares of BHC voting, preferred stock, representing a 20 percent voting interest in

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[1] Also before us are: (1) the agreement between Chris-Craft and Warner, submitted January 9, 1984; (2) letters submitted on behalf of Warner and Chris-Craft dated January 12 (three letters), 16, 18, 20, 30 and 31, 1984; and (3) letters submitted on behalf of News International on January 6, 12, 17, and 19, 1984.

[2] Such premerger notifications are required by 15 U.S.C. § 18A. On January 5, 1984, News International filed an amended Schedule 13D with the Securities and Exchange Commission, similarly giving notice of its intention to acquire up to 49.9 percent of Warner's stock.

[3] BHC controls Chris-Craft Television, Inc., which in turn controls KCOP Television, Inc., licensee of station KCOP(TV), channel 13 (Ind.), Los Angeles, California and Oregon Television, Inc., licensee of station KPTV (TV), channel 12 (Ind.), Portland, Oregon. BHC also controls (50.1 percent) United Television, Inc., licensee of station KMSP-TV, channel 9 (Ind.), Minneapolis, Minnesota, station KTVX-TV, channel 4 (ABC), Salt Lake City, Utah, and Station KMOL-TV channel 4 (NBC), San Antonio, Texas. United Television, Inc., also controls UTV of San Francisco, Inc., licensee of station KBHK-TV, channel 44, San Francisco, California. A chart depicting BHC's licensed stations and corporate ownership is attached as Appendix A.

[4] *Television and Cable Factbook (1982-83),* Services Volume, p. 1538.

BHC. Chris-Craft retains the remaining 80 percent. After September 15, 1984, Warner has the option of converting its preferred shares into 42.5 percent of BHC's common stock, leaving Chris-Craft with a 57.5 percent interest. In exchange, Warner offered two options. The first was to give BHC 15.2 million shares of voting, nonconvertible preferred stock, all of which are newly issued.[5] Under this option, BHC would have 19 percent voting interest in Warner. Alternatively, the agreement provides that Warner may require BHC to take its interest in the same number of convertible preferred shares, representing a 15.6 percent voting interest.[6] This is, in fact, the option that was taken. If BHC then converts these shares into Warner common stock, it would own 12,001,920 shares. BHC states that it has no present intention to convert its preferred shares.

6. Other features of the agreement include provisions to prevent dilution of either BHC's or Warner's voting interests. Warner and BHC retain the right of first refusal with regard to the shares each owns in the other. The agreement provides that BHC's charter and by-laws will be amended to permit cumulative voting, which assures that Warner will have a minority representation on BHC's Board. Further, BHC's by-laws can be amended only by approval of at least two-thirds of its shareholders (85 percent approval before December 31, 1984), thereby requiring Warner's acquiesence in any such changes. The same levels of shareholder approval are required before the "sale of substantially all the BHC assets, merger or liquidation of BHC or transactions with affiliates of BHC." Neither Chris-Craft nor Warner may engage in broadcasting or cellular radio operations except through through BHC.[7]

7. *Other Matters.* News International sought a temporary restraining order in the Delaware Court of Chancery to prevent implementation of the Chris-Craft/Warner agreement. The court refused to issue such an order. *News International plc. v. Warner Communications, Inc.*, Civil Action No. 7420 (Del. Ch., Jan. 11, 1984).

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[5] See the amended SEC Schedule 13D submitted to us on January 30, 1984. The issuance of this new stock had the effect of diluting News International's interest in Warner from seven to five percent. Subsequent pleadings show that News International thereafter increased its interest to 8.5 percent, which is the figure we shall use here.

[6] In the event of default in the payment of preferred dividends, BHC's interest in Warner could increase in certain circumstances to 22.8 percent, in the case of the nonconvertible preferred shares, or 18.14 percent in the case of the convertible preferred shares. Alternatively, instead of the larger voting interest in the event of a default, BHC can appoint two additional directors of its choosing to Warner's 16-member Board.

[7] News International states that Warner will be able to block the payment of BHC dividends. It does not point to any specific provision in the agreement to support this conclusion, and we are unable to find such a restriction. News International may be referring to certain covenants to retain the status quo in the period between the signing of the agreement, December 29, 1983, and the closing on January 18, 1983. Such a brief, temporary restriction is not of decisional significance.

8. Chris-Carft and its subsidiaries have also acquired Warner common stock in the open market representing a 3.1 percent voting interest. That interest, plus the 15.6 percent voting preferred interest BHC obtained from Warner under the agreement, gives Chris-Craft a total 18.7 percent of the voting Warner shares.[8]

9. News International initially sought expedited action and Commission issuance of an order to preserve the status quo until we had the opportunity to consider the various arguments. However, in its January 13 reply, News International noted that Warner and Chris-Craft represented that they would not close the transaction until they were in compliance with all Commission requirements. Part of the plan to come into compliance includes the sale to new subsidiaries of American Express of the cable television systems located within the Grade B contours of stations KCOP(TV) and KPTV(TV). Counsel familiar with such matters in California and Oregon gave opinions that local approval of such transfers is required and that approval cannot be obtained, under the best of circumstances, earlier than 45 days in some cases and 90 days in others.[9] News-International concluded that local approval could not be obtained promptly and that the urgency underlying its "Petition for Expedited Temporary Relief" had abated. On January 16, 1984, Warner and Chris-Craft responded, essentially stating that News International had mischaracterized their position. Finally, on January 18, 1984, Warner Amex transferred the affected cable television systems to the new entities, and Warner and Chris-Craft/BHC consummated their agreement.[10]

The Issues Raised

10. News International believes the agreement raises three issues requiring Commission action. It alleges: (1) that Warner's acquisition of a

[8] See SEC Schedule 13D, submitted to us on January 30, 1984. Chris-Craft also stated in Schedule 13D that it might later increase its holdings in Warner to a total of 25 percent.

[9] According to News International, local consent had not been sought as of January 12, 1984.

[10] In view of our action here, News International's petitions to issue orders preventing the consummation of the agreement, or ordering a return to the status prior to closing, are moot and will be dismissed. We note, however, that such requests are for extraordinary relief that carry with them an obligation to show irreparable injury to the requesting party or a substantial injury to the public interest. News International was unsuccessful in demonstrating to the Delaware court that it would suffer irreparable injury by the exchange of minority interests between Warner and BHC, and has not demonstrated to us that the violations alleged are irreparable injury as to it. Further, the violations alleged and any harm to the public interest can be undone, if necessary. Thus, the issuance of the request orders would not have been appropriate. *See generally Communications Satellite Corp.*, 83 F.C.C.2d 150 (1983), and the cases cited there. *Compare United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)(the Commission's failure to act might cause a substantial injury to the public by taking away an established service at a later date).

minority interest in BHC and BHC's acquisition of a minority interest in Warner[11] constituted a transfer of control requiring prior Commission approval under section 310 of the Communications Act[12]; (2) that News International's own control of the two San Antonio newspapers and its 8.5 percent interest in Warner violate the newspaper/television ownership restrictions set out in section 73.636(a)(1) of the Rules, by virtue of Warner's indirect interest in BHC's television station KMOL-TV, San Antonio; and (3) that American Express' ownership of cable television systems located within the Grade B contours of stations KCOP(TV) and KPTV(TV) violate the television broadcast/cable television ownership restrictions set out in section 76.501 of the Rules. News International also alleges that Chris-Craft/BHC and Warner have made misrepresentations to the Commission or were lacking in candor in connection with the pleadings filed in this proceeding.

11. *The Need for Prior Commission Approval - Warner's Interest in BHC.* Under the agreement, BHC will have two shareholders - Chris-Craft and Warner. Assuming that Warner exercises its conversion option, Chris-Craft will retain control of 57.5 percent of BHC's stock and Warner will control the remaining 42.5 percent. Thus, we are not faced with an issue as to control in law (*de jure* control), but rather as to actual control (*de facto* control). Chris-Craft urges that no change in control has occurred, citing *WHDH, Inc.*, 17 F.C.C.2d 856, 863 (1969), and *Benjamin L. Dubb*, 16 F.C.C. 274 (1951). The latter is cited for the proposition that a *de facto* transfer of control is to be found where an individual or corporation has the "power to dominate the management of the corporate affairs." *Id.* at 289. Chris-Craft states that the transfer of substantial minority interest, without more, does not constitute a transfer of control, citing *Columbia Broadcasting System, Inc.*, 7 R.R. 298 (1951), where the Commission found unobjectionable a transfer of 26.6 percent of the licensee's stock. Warner disavows any intent to control BHC.[13] Further, Chris-Craft states

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[11] Warner is the licensee of numerous nonbroadcast radio licenses, including CARS and business radio licenses, either directly or through subsidiaries such as Warner Amex.

[12] Section 310(d) of the Communications Act, 47 U.S.C. § 310(d), provides in part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

[13] According to the joint opposition:

> Warner is not seeking to dominate the management of BHC, nor has it expressed any desire to seek to acquire such power in the future. Given Chris-Craft's 80 percent interest in BHC, and even its post-conversion 57.5 percent interest, the contention is patently absurd. Warner is fully cognizant of the requirements and restrictions of

that it "will retain control of BHC's finances, and will exercise its power to vote a majority of the stock." These affirmative statements, according to Warner and Chris-Craft, obviate the alleged need for a transfer application, citing *KCOP Television, Inc.*, 71 F.C.C.2d 1430, 1443 (1979).[14]

12. With regard to the specific limitations imposed on BHC as a result of the agreement (see paragraph 6, above), BHC states that these provisions "are customary in closely held corporations where the parties desire to protect the interests of the minority shareholder." It cites *Cleveland Television Corp.*, 91 F.C.C.2d 1129, 1132-33 (Rev. Bd. 1982), *review denied* FCC 83-235 (released May 18, 1983), *appeal pending*, No. 83-1659 (D.C. Cir. filed June 15, 1983), and *Coral Television Corp.*, 29 F.C.C.2d 266 (Rev. Bd. 1971), in support of its position. These cases, according to BHC, established that provisions such as those found in the present agreement are unobjectionable. Chris-Craft believes that there are no specific facts to establish an actual change in control and, in the absence of such specificity, urges rejection of that allegation.

13. News International contends that an actual transfer of negative control of BHC has occurred. It cites *Data Transmission Co.*, 44 F.C.C.2d 935 (1974), where a minority stockholder, who was a substantial investor but not an officer or director of the licensee, had to approve certain transactions, including the sale of corporate assets, mergers, purchasing stock in other corporations and loan guarantees. We held that such restrictions, which were designed to protect the minority shareholder's investment, do not automatically constitute a transfer of control. When, however, such restrictions are coupled with the investor's activities in the affairs of the corporation, our prior approval may be required. *Id.* at 935-37. News International states that many of the enumerated covenants listed in *Data Transmission* are found in the Chris-Craft/Warner agreement. Further, the agreement couples the restrictions with other activities on Warner's part; namely, representation on the BHC Board of

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Section 310(d), and recognizes that it would have to obtain necessary approvals before it could become a Commission licensee. Warner is not attempting to acquire such control of BHC without such approvals.

[14] Chris-Craft was the party in the *KCOP Television* case disavowing, in 1979, an intention to acquire 20th Century Fox, which was then the parent of United Television, Inc. ("United"). News International notes that Chris-Craft later acquired United through BHC and contends, therefore, that Chris-Craft cannot be relied on to comply with section 310 of the Act or to be candid with the Commission. Our records disclose, however, that after the *KCOP Television* case, United changed from a subsidiary of 20th Century Fox to an independent company traded over the counter. After that change, Chris-Craft acquired control of United, but only after the Commission granted approval on October 13, 1981 (BTC-810618KE). Thus, given the passage of time, the significantly changed circumstances, and Chris-Craft's filing of a transfer application for our prior approval, we reject the challenge to Chris-Craft's credibility or candor based on its acquisition of United.

Directors, a substantial equity interest and the power to prevent amendment of BHC's charter and by-laws.

14. News International also believes that the cases cited by Chris-Craft, *Cleveland Television Corp* and *Coral Television Corp.*, above, do not support Chris-Craft's position. Rather, News International views *Cleveland Television* as limited to our approval of the right of preferred shareholders to vote only on changes in the articles of incorporation insofar as the changes "affect or alter the value, class or terms of the preferred stock." 91 F.C.C.2d at 1132. *Coral Television*, according to News International, stands for the proposition that the ability to block the sale of a station constitutes negative control, but that a factual dispute as to whether the minority shareholder can in fact block such a sale is a matter that can be rebutted after a full hearing.

15. In further support of its contention that review of Warner's acquisition of a minority interest in BHC requires our prior approval, News International states that serious questions exist as to Warner's qualifications to be a licensee of the Commission. According to a January, 1983 article published in *New York Magazine*, Messrs. Jay Emmett and Solomon Weiss, who are described as senior Warner executives, were convicted of federal crimes flowing from their acceptance of bribes in connection with Warner's purchase of a theater. In opposition, Warner states that Mr. Weiss asserts his innocence and is appealing his conviction. He is currently on paid leave. Mr. Emmett, a former officer and director of Warner, pled guilty on February 10, 1981, to two counts of interstate transportation of stolen money. He resigned his position at Warner after the plea. Further, in a related case, Mr. Leonard Horwitz, a former sales and marketing director of Warner, pled guilty to two counts of income tax evasion, after which he was fired. Because the individuals are no longer associated with Warner, it concludes that no adverse inferences can be drawn as to Warner's qualifications.

16. Given the widely varying fact patterns that arise in the business world, there is no precise formula by which all factors can be evaluated when confronted with questions of transfer of control. We stated generally in *WHDH, Inc.*, above: "[A] realistic definition of the word 'control' includes any act which vests in a new entity or individual the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue." 17 F.C.C.2d at 863. A general statement made with reference to *de facto* transfers of control is found in *Benjamin L. Dubb*, above:

> [I]n passing upon the issue of whether a particular individual holding only a minority stock interest of record in a corporation may be in actual control thereof, while we regard his minority interest as an important element in our determination of the issue, we are governed chiefly by the demonstration of his power to dominate the management of corporate affairs.

16 F.C.C. at 289. It should be clear from these passages that influence and control are not the same. The influence must be to the degree that a minority shareholder is able to "determine" the licensee's policies and operation, or "dominate" corporate affairs. With these general guidelines in mind, we turn now to the specific factors presented here.

17. This is not a case where we can review retrospectively the operations of a corporation and the conduct of its principals under a long-existing charter, by-laws or agreement. Rather, we must review prospectively the materials before us and representations as to future conduct. In that regard, this case is unlike cases such as *L.B. Wilson, Inc. v. F.C.C.*, 397 F. 2d 717 (D.C. Cir. 1968) and *Coral Television Corp.*, above, to the extent that they involved activities of persons acting under an existing corporate structure. In the case before us, therefore, we believe it is not appropriate to infer, in the absence of information to the contrary, that BHC will not faithfully carry out its representations or that it will be controlled and operated in a manner that differs from the agreement under consideration. *KCOP Television, Inc.*, above, 71 F.C.C.2d at 1443-44. Further, despite Warner's substantial minority interest in BHC, Chris-Craft will retain majority control in terms of voting power and of electing a majority of the Board of Directors. Chris-Craft states that it intends to exercise that control, and Warner denies any intention to exercise control. Thus, as in the *Columbia Broadcasting System* case, above, the transfer of the minority interest to Warner does not constitute a transfer of control by itself.

18. We must nonetheless review the specific terms set out in the Chris-Craft/Warner agreement. To put those terms in context, the following quotation from the *Data Transmission* case, above, is helpful:

> Of particular importance are certain negative covenants Haefner [the proposed minority buyer] proposes to impose on Datran tada Commission point-to-point microwave permittee]. These covenants preclude or limit Datran in undertaking various activities of a financial nature without Haefner's consent; e.g., selling shares of its common stock, merging with another corporation, selling or leasing its assets, purchasing stock of other corporations (other than wholly owned subsidiaries), and the making or guaranteeing of loans. The question raised by these covenants is whether such restrictions represent a transfer of control of Datran. In *Flathead Valley Broadcasters*, 5 RR 2d 74 (Rev. Bd. 1965), it was held that restrictions of the type proposed by Haefner, for the express purpose of protecting a lender's investment, do not necessarily represent a "transfer to control" requiring Commission approval . . . . However, in *WWIZ, Inc.*, 36 FCC 561 (1964), we also indicated that so-called investor activity in the affairs of a corporation can and often do lead to the type of control requiring our approval.

44 F.C.C.2d at 936-37. We found the agreement in *Data Transmission* to be consistent with the Act, despite those covenants and Haefner's substantial investment in the corporation in voting stock and in convertible debentures.

19. In view of the subsequently decided *Data Transmission* case, *Coral Television*, above, cannot be read as a specific requirement for a hearing whenever a minority shareholder has the right, for example, to block the sale of the corporation's principal assets. Such a view is also inconsistent with our long-held position that questions as to transfers of control must be answered with reference to the specific facts presented. Similarly, the court in *L.B. Wilson*, above, did not hold that a minority right to block the sale of substantial assets dictates a finding of *de facto* control. Instead, the court held only that if the ability to block the sale of a corporation's assets is a factor to be considered under section 310, then allegations as to that factor must be addressed.[15]

20. Other covenants in *Data Transmission* included the right of the minority shareholder to approve mergers and the issuance of additional shares. The latter has the same effect as Warner's right to prevent dilution of its interest in BHC. The right of first refusal in the present case does not appear to us to be a particularly significant indicia of control. Rather, it reflects primarily a business judgment that Warner and Chris-Craft may be willing to do business together, to the extent stated in the agreement between them, but not necessarily with other entities. The prohibition against engaging in broadcasting or cellular radio operations except through BHC is in essence a covenant not to compete. This too appears to be a reasonable business judgment. It grants neither party control. Unlike *Data Transmission*, Warner will not provide funds to BHC, but will have a minority position on BHC's Board. Yet Warner's membership on the Board will always be confronted, in this very closely held company, by Chris-Craft's superior voting power and Board membership. We have also looked closely at Warner's right as a minority shareholder to block any change in BHC's charter or by-laws. News International has submitted nothing to suggest that those documents do anything except provide a workable outline for corporate management and structure. It has not alleged that the present by-laws set policy for the day-to-day operation of the stations or prevent necessary expenditures for station maintenance and operation. There is nothing in the present by-

[15] By way of contrast, a review of the proceeding in *WWIZ, Inc.*, 36 F.C.C.561 (1964), *aff'd sub nom. Lorain Journal Co. v. F.C.C.*, 351 F.2d 824 (D.C. Cir. 1965), helps place the present case in context. There, the minority shareholder: (1) was able affirmatively to have changes made in the licensee's charter and by-laws (in contrast to being able to block limited kinds of changes); (2) placed his own attorney on the Board, which, coupled with his own membership, could give him control of the three-member body; (3) the licensee's books; and (4) was actively involved in the station's day-to-day operations. The putative controlling shareholder ultimately spent no time at the station, took no significant part in corporate affairs, and was described as a man who had relinquished control. 351 F.2d at 827-28. The court upheld in those circumstances the Commission's finding that an unauthorized transfer of control had occurred.

laws to suggest that Warner will be able to set BHC's policies as to finances, personnel policy and actions, or programming, which are the three most important factors in determining control. *Stereo Broadcasters, Inc.*, 87 F.C.C.2d 87, 93 (1981). Chris-Craft has specifically represented that it will retain control of BHC, which we understand to include these three factors.

21. We can summarize the above succinctly. This is not a case with an existing record showing that the parties have departed from their agreement and representations. We rely, therefore, on the representations of Chris-Craft/BHC and Warner as to their future conduct. Warner can block certain major transactions that BHC might wish to make, but that power appears to be designed primarily to protect Warner's minority interest, in our view. Warner cannot compel BHC to make the major transactions. Chris-Craft will retain a majority voting interest and will select a majority of BHC's Board of Directors. BHC will be able to conduct business on a majority vote as to all matters except the major transactions. There is nothing in the record to suggest that the operation of BHC's stations, including personnel practices, finances and programming, will be controlled in any way by Warner. We have considered all of the above factors individually and cumulatively, specifically including the representations made to us by Chris-Craft/BHC and Warner. We find on the record before us that the agreement between Chris-Craft and BHC on one hand, and Warner on the other, does not grant Warner "the right to determine the manner or means of operating the licensee [BHC] and determining the policy that the licensee will pursue," *WHDH, Inc.*, 17 F.C.C.2d at 863, or indicate that Warner will "dominate the management of [BHC's] corporate affairs." *Benjamin L. Dubb*, 16 F.C.C. at 289. Consequently, we find no transfer of control of BHC from Chris-Craft to Warner and no violation of Section 310 of the Act.

22. That conclusion is not changed by News International's allegations concerning the derelictions of a former employee and officers of Warner. First, transfer-of-control questions and qualifications of Warner to be a licensee are separate issues. Second, the matters alleged are not properly supported, are not ripe for review, or do not appear to reflect adversely on Warner's qualifications. News International has submitted only press accounts of these matters. It has not submitted affidavits from persons with actual knowledge of the facts or copies of court proceedings or decisions that we might officially note. Even accepting as true the three convictions (with one appeal pending), the material submitted by News International does not indicate that the three individuals were acting on Warner's behalf or for its benefit. Instead, it appears that they were

taking bribes for their own benefit, to Warner's detriment.[16] Mr. Weiss is appealing his conviction and any judgment as to him is premature. Further, he is not participating in the operation of Warner. The other two persons left Warner long before the present proceeding began. Their activities bore no relationship to any matters we regulate. We are obviously concerned about violations of federal laws. Nonetheless, we would strain too far to attribute to BHC the derelictions of the three individuals formerly connected with Warner, a minority BHC shareholder, who are no longer connected with Warner and who appear to have been acting for their own benefit, not for the benefit of Warner. Based on the record before us, we cannot foresee that Warner's interest in BHC will adversely affect the latter's ability to operate in the public interest, or that any further action on our part is warranted. *See Sande Broadcasting Co.*, 61 F.C.C.2d 305, 308-09 (1976).[17]

23. *The Need for Prior Commission Approval - BHC's Interest in Warner.* Chris-Craft contends that BHC's minority interest in Warner will similarly not constitute a transfer of control of Warner. Control, according to Chris-Craft, will remain where it is now; "in the hands of incumbent Warner management and its public shareholders." Chris-Craft states its awareness of section 310 of the Act and the need for prior

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[16] The January 24, 1984 *New York Magazine*, submitted by News International, states at p. 26:

> These bribes, the feds say, were paid with cash siphoned from Warner's own treasury by corrupt officials using phony invoices and bills supplied by the Premier Theater people.
>
> "The crooked Warner execs were double-banging their own company," one investigator said, "First they got their company to buy a bust-out, mob-run theater, and they sucked money out of their company in phony bills to pay themselves bribes."

[17] News International also suggests, based on articles published in *New York Magazine*, that Mr. Steven J. Ross, Chief Executive Officer of Warner, engaged in criminal activities related to the matters set out in the text. Such articles are not the basis for action on our part. No indictment of Mr. Ross has issued, according to the same article, and no affidavits from persons with personal knowledge of the facts have been submitted. Thus, Mr. Ross' denial of wrongdoing carries as much weight as the accusations in the article. Additionally, in its reply pleading, News International filed a copy of an antitrust complaint filed January 10, 1984, against Chris-Craft and others in the Colorado Federal District Court, alleging violations of the antitrust laws. Such unanswered complaints are not the basis for Commission action. When transfer or assignment applications are before us and the buyer has litigation pending against it, including antitrust matters, our practice is to condition the grant subject to the outcome of the litigation. *See Kaiser Broadcasting Corp.*, 46 F.C.C.2d 589 (1974). There is no application on file in this case, but we obviously retain the ability, if needed, to review Chris-Craft's qualifications after any final determination has been made in the court proceeding.

Commission approval before it could acquire control of Warner.[18] Chris-Craft again notes the Commission's statement in *KCOP Television, Inc.*, above, that assertedly negates the need for a transfer application.

24. News International takes the position that BHC's 18.7 percent interest[19] in Warner constitutes *de facto* negative and positive control of Warner. According to copies of Warner's charter, several major transactions essentially require a vote of approval of 80 percent of the corporation's issued shares.[20] Moreover, because the present directors own four percent of Warner's stock, their votes combined with BHC's stock allegedly assure a veto right as to the major transactions. News International alleges that BHC and the present Warner Board can be expected to act in concert because they have already taken concerted action in negotiating the agreement now under consideration, which allegedly includes provisions favorable to Warner's present Board and management. News International also notes that the 80 percent voting requirements are based on the number of shares outstanding, not on the number voting on a particular issue. Thus, BHC's 18.7 percent interest, plus the failure to vote by 1.3 percent of the remaining shareholders, would block any of the major transactions or removal of directors. News International points to several issues put to Warner shareholders at recent annual meetings where from 12 to 50 percent of the outstanding shares were not voted. Finally, the agreement prohibits Warner's ownership of broadcast or cellular radio stations, except through BHC. All these restrictions, in News International's view, constitute *de facto* negative control of Warner by BHC.

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[18] The affidavit of Herbert J. Siegel, President and Chairman of Chris-Craft, states:

> Chris-Craft will vote its Warner stock in a manner consistent with its minority shareholder position. Chris-Craft will not have the power to dominate Warner, and has no present intention to acquire "control" of Warner as the term is interpreted under Section 310 of the Communications Act. Chris-Craft recognizes that it would be required to obtain necessary approvals before it could acquire such "control."

[19] See paragraphs 5 and 8, above.

[20] The following transactions require 80 percent approval: (1) any merger of Warner with another entity; (2) any sale or lease of all or a substantial part of Warner's assets; (3) Warner's issuance of debt or equity securities to another entity in exchange for assets or securities of that entity, where the amount involved is $1,000,000 or more; and (4) Warner's issuance of any debt or equity security for cash. These transactions can be approved only in the following manner: (1) by an 80 percent vote of the outstanding shares; (2) where any of the major transactions are to be made with an entity that holds ten percent or more of Warner's stock, then only a majority approval is required, but the other entity's shares are not included in the base used to compute a majority; or (3) unanimous consent of the Board attending a meeting (at least 80 percent of the directors must be in attendance), and further approved by a majority of the shares voted at the meeting. Removal of directors also requires an 80 percent vote.

25. News International also believes that BHC's 18.7 percent interest, as the largest single block of Warner stock, constitutes a *de facto* transfer of affirmative control. It asserts that substantial minority interests coupled with the ability of minority shareholders to block certain transactions have been found to be *de facto* affirmative control by those shareholders, citing *Areawide Communications, Inc.*, 12 F.C.C.2d 170 (1978), and *Paramount Television Productions, Inc.*, 17 F.C.C. 264, 340-343 (1953). The *Paramount* case is similar to the present case on many points, according to News International.

26. News International submitted the transcript from the Delaware court proceeding in *News International plc v. Warner Communications, Inc.*, above. Portions of the testimony of Mr. Herbert Siegel, President of Chris-Craft, and of Mr. David Horowitz, cochief operating officer of Warner, are specifically noted to support News International's position that a transfer of control of Warner occurred and that present Warner management can be expected to act in concert with their Chris-Craft/BHC counterparts. That testimony shows that the idea of an exchange of interests in the two companies originated with Mr. Siegel, that one of the factors that might be attractive to Warner was an interest in BHC's stations, and that one of the purposes of the transaction was to thwart News International's efforts to acquire control of Warner. News International characterizes portions of the testimony as conceding that as little as 15 to 20 percent of Warner's stock may constitute actual control. It states that without control, there is no advantage in BHC's stated interest in obtaining "a major position in a motion picture and television production company. . . ." News International concludes that a hearing is required "where a friendly party intervenes in an effort to thwart a takeover opposed by inside directors" to determine "the likelihood that the insiders and the 'rescuing' outside[r] will continue to act in concert and vote their shares together."

27. The general considerations in dealing with transfers of control set out in paragraphs 15 - 18, above, are applicable to BHC's minority interest in Warner, and need not be repeated here. We turn, then, to the issue of BHC's alleged control of Warner. We can concede that BHC, with its 18.7 percent interest, may be able to block in some cases the major transactions described above. That follows from the 80 percent vote required to make those transactions based on the number of shares outstanding, and the information submitted by News International that some issues before the shareholders at recent Warner annual meetings were voted on by anywhere from 50 to 87 percent of the shares outstanding. The kinds of major transactions requiring supermajority approval are very similar to those Warner required to protect its minority interest in BHC. In Warner's case, the supermajority requirements were in place long before

the present controversy arose,[21] but it is clear that Mr. Siegel viewed those provisions as protection for BHC's minority interest in Warner.[22] BHC may be able to block the major transactions, but cannot compel them. Simply majority votes are required as to all other transactions. Further, Warner's charter and by-laws were not amended to permit cumulative voting, so there is no likelihood that BHC can elect individuals to the Warner Board of Directors without the approval of Warner's other shareholders and its management.

28. We find too speculative News International's belief that Chris-Craft/BHC will act in concert with Warner's present Board and management in the future on all matters. The fact that the parties acted in concert after Mr. Siegel's overtures to work out an agreement is not surprising. Without such concerted action there would not have been an agreement. Moveover, the agreement finally signed contains numerous provisions to protect Warner's interests. That pattern is inconsistent with the supposition that Warner will automatically acquiesce in any BHC demand. The question is not whether the parties acted in concert in negotiating an agreement, but whether they will act in concert under the agreement in such a way as to permit BHC to "dominate" Warner's corporate affairs. Chancellor Grover C. Brown, in his opinion in *News International plc v. Warner Communications, Inc.*, above, stated:

> I cannot conclude at this point that the proposed transaction will deprive the plaintiff [News International] of any voting right or position which it now has. Plaintiff is arguing that by issuing what in practical effect is a 20% interest to the subsidiary of Chris-Craft, Warner's management is depriving plaintiff for all time of the opportunity, either through the acquisition of stock or through proxies obtained from other Warner shareholders, to exercise the required 80% vote. However, this argument rests necessarily on the assumption that Chris-Craft will always vote its shares with Warner's management hereafter, and I am not convinced from the

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[21] The supermajority requirements are found in the corporate charter as far back as February 24, 1972.

[22] The court transcript provides the following exchange. The answers are those of Mr. Siegel:

> A. I want to clarify something that may save you a lot of time and me a lot of time. The by-law that you are talking about, I didn't remember until way after, I think it was when we finally reached the agreement. I said, "Gee, I think Warner's has some deal, as I remembered it years ago, that said that it can't force a merger without 80 percent of the vote." I thought it might have been 75, that's how vague it was in my mind. If I would have played on that, if I would have - I mean this deal could have been done faster and a lot easier.
>
> Q. Why?
>
> A. Why? Because I think we would have had less concerns about some of the protections that we wanted.
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> Transcript, pp. 99-100.

> present record that the plaintiff has demonstrated that this is likely to be so. Moreover, Chris-Craft states that it is independent and under no such obligation. Thus, in theory, there is nothing to prevent Chris-Craft, should it so desire, from voting its shares with those of plaintiff in an effort to produce the 80% vote necessary to take action against the wishes of Warner's present management. It could accomplish the same thing in league with 60% of Warner's present shareholders other than the plaintiff. Thus, it does not appear that the proposed transaction itself will necessarily deprive plaintiff and the shareholders of Warner other than management from the opportunity of ever taking action against management.

Slip Op. at pp. 3 - 4. Thus, contrary to the position taken by News International, the Chancellor was not convinced that Warner and Chris-Craft, through BHC, will necessarily act in concert. We have reviewed the portions of the record in that proceeding submitted to us and, for the reasons stated, agree with his conclusion.

29. We also reject the contention that BHC could only benefit from the agreement by controlling Warner. BHC can obtain substantial income from its investment and the potential for capital gains.

30. We now turn to the portions of the transcript in the Delaware court proceeding that, according to News International, establish that BHC believed its minority interest gave it control of Warner. News International quotes the following excerpt from Mr. Siegel's testimony:

> Q. Why was that important to you, to have this right during the time you held the straight [nonconvertible] preferred?
>
> A. Well, if we were going to sit with a straight preferred and somebody else was to get control of Warner's, we wanted to have the right to cash it in.
>
> Q. Why was that?
>
> A. Because I didn't want to sit with a straight preferred and somebody else being able to change the debt structure and do anything they wanted with the corporation.

News International apparently reads the reference to "somebody else" to mean someone other than Mr. Siegel or his corporations, Chris-Craft and BHC. We disagree and interpret "someone else" to refer to someone other than the present Warner management and non-BHC shareholders. Mr. Siegel's second answer makes our interpretation clear, because BHC can not affirmatively change Warner's debt structure. Further, the testimony at that point discussed the ability of BHC to "cash it in" if another entity gained more than a specified percentage of Warner's stock, not BHC's control of Warner.[23] Thus, we do not accept this testimony as indicating Mr. Siegel's belief that BHC's minority interest controlled Warner.

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[23] This testimony concerned a "put" option that would be in effect if BHC took its shares in Warner as nonconvertible preferred stock. As noted above, BHC tooks its interest in convertible shares, so the "put" option is not in effect. A "put" is an option to sell a stipulated amount of stock at a set price, usually within a fixed time. In this case, if the option were in effect, Warner would have been required to repurchase the shares held by BHC if another entity acquired one third or more of Warner's outstanding common shares. Exchange Agreement, section 5(h), pp. 10-13.

31. We believe News International mischaracterizes other testimony as conceding that a 20 percent interest in Warner constitutes control. Mr. Siegel's testimony cited by News International (p. 84, transcript) discusses the level of voting interest by a third party that would trigger the "put" option (see footnote 23, above). Although Mr. Siegel sought to negotiate a lower level (20 percent), the agreement ultimately specified that a purchase by a third party of one-third of Warner's stock would trigger the "put" option. Thus, if "control" were the subject of this testimony, the inference is that the parties ultimately believed that a one-third interest, well above BHC's holding, would be needed to obtain control. More importantly, Mr. Siegel did not use the word "control" in this part of his testimony, and the context clearly indicates that he was referring to the level of third-party investment in Warner that would permit BHC to "cash in" its Warner stock. In Mr. Siegel's words, this was a provision for "[p]rotecting ourselves," not to define control under section 310. Similarly, the testimony of Mr. David Horowitz, a Warner officer, does use the word "control," but only in the context of triggering certain rights then being negotiated.[24] No part of his testimony discusses a definition of "control" with regard to the operation of Warner or the use of that word for the purposes of section 310 of the Act. As previously noted, the parties to the negotiations subsequently stated their awareness of, and obligations under, section 310. We conclude that the testimony cited by News International fails to establish that the negotiating parties

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[24] Mr. Horowitz' testimony includes the following answers:

> Q. Can you tell us, please, what was discussed [at a particular meeting]?
>
> A. As I recall it, there was a review of the various terms of the agreements. Most of the discussion, as I recall it, centered again on the matter of the Warner Brothers option.
>
> * * * * *
>
> I recall also that the issue of how to define change of control was discussed at great length, Mr. Siegel wanting a much more stringent definition than the Warner representatives were willing to accept. Mr. Siegel took the position that if 15 percent of the company were purchased by a third party, that that would constitute a change of control which would trigger these two rights.
>
> Q. I'm sorry, these two rights being –
>
> A. The one, the option to purchase Warner Brothers. And the other, the right to put back or take back the 42½ percent of the stations. The Warner Brothers' representatives proposed that change of control would be defined, and *I must stress that this was one branch of control definition*, as someone purchasing an amount of [Warner] stock equal to 10 percentiles or more than ... BHC's holdings as of that time.
>
> Transcript, pp. 71-72, emphasis added.

believed that BHC would acquire control of Warner, within the meaning of section 310 of the Act, as a result of their agreement.

32. We do not believe that the cases cited by News International are precedent for a finding of an unauthorized transfer of control in this case. Our decision in *Areawide Communications, Inc.*, above, is not on point. There was no factual dispute in that case. The licensee had already conceded that a 17 percent sale of stock constituted a transfer of control on the facts presented. The decision goes primarily as to the sanction for the violation. It does not stand for the proposition that a 17 percent or more transfer of stock, without more, constitutes a *de facto* transfer of control. Indeed, our earlier decision in *Columbia Broadcasting System, Inc.*, 7 R.R. 298 (1951), which involved a transfer of a 26.6 percent minority interest, is clearly contrary to that position. *Paramount Television Productions, Inc.*, above, is also properly distinguished from the present case. *Paramount* involved a review of the actual operation of the corporate licensee, Dumont Laboratories, under existing corporate charter and by-laws. BHC's actions, in contrast, are prospective at this time, and we have BHC's unequivocal statement that it has no present intention of taking control of Warner's operation. *See KCOP Television, Inc.*, 71 F.C.C.2d at 1443-44. *See also Data Transmission Co.*, 52 F.C.C.2d 439, 441 (1975). Further, Paramount Television, as a minority stockholder held all of the "B" class stock which entitled it to elect three of Dumont's eight directors, and had the absolute right to appoint the Secretary, Treasurer and Assistant Treasurer of the licensee. The Dumont Treasurer was also a Vice President and director of Paramount. In his role as Treasurer of Dumont, he played a substantial role in corporate affairs and controlled the purse of Dumont. He was responsible for "corporate funds, securities, receipts and disbursements, and other important duties." 17 F.C.C. at 343. Control of corporate finances is an important aspect of corporate control, *see Heitmeyer v. F.C.C.*, 95 F.2d 91, 99 (D.C. Cir. 1937), and that factor is missing in the present case. Further, BHC has no right to elect any Warner directors or to select any specific officers.

33. We can summarize our conclusions briefly. We rely on the representations of Chris-Craft/BHC and Warner as to their future conduct and awareness of the obligations imposed by section 310 of the Act. While BHC may be able to block certain major transactions, that power has the effect of protecting BHC's minority interest, and was recognized as such by Mr. Siegel. BHC cannot compel Warner to make the specified major transactions, and Warner will be able to conduct its affairs on a simple majority vote on all other matters. Because Warner does not permit cumulative voting, present Warner management and shareholders will control the Board of Directors. We find nothing in the record before us to suggest that BHC has acquired control of Warner's

finances, personnel policies and practices, or its other regular business activities. We find that BHC will not be able to determine Warner's policies or dominate its affairs. *WHDH, Inc.* and *Benjamin L. Dubb*, above. We conclude, therefore, that there has been no transfer of control of Warner to BHC and no violation of section 310 of the Act.[25]

34. *The Newspaper/Broadcast Cross Interest.* Section 73.636(a)(1) provides in part:

> No license for a television broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: . . . a daily newspaper and the grant of such license will result in the Grade A contour . . . encompassing the entire community in which such newspaper is published.

News International seeks to apply the rule to the following facts. It publishes two daily newspapers in San Antonio.[26] It also owns an 8.5 percent interest in Warner. Warner has a 20 percent interest in BHC (later convertible to a 42.5 percent interest), which in turn owns 50.1 percent of the shares of United, licensee of station KMOL-TV, San Antonio.[27] News International will not be able to elect any directors of Warner and the two corporations share no officers, directors or management-level employees.

35. BHC and Warner challenge the applicability of the rule on several grounds that have merit. First, the Commission has clearly stated: "[I]f a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of its stations there within 1 year or by its next renewal application, whichever is longer." *Multiple Ownership*, 50 F.C.C.2d 1046, 1076, n. 25 (1975). Station KMOL-TV's present license does not expire until 1988. We believe the policy of deferring such questions until renewal time should apply to the facts here. Accordingly, there is no present violation of the rule.

36. BHC also urges that there will be no violation of the rule at renewal time. In dealing with minority ownership interests involving parent and subsidiary corporations, or an individual's minority ownership interests in corporations, the Commission has used a multiplier approach. *Jefferson Standard Broadcasting Co.*, 33 F.C.C. 471, 474-75 (1962).[28]

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[25] Because we have concluded that no transfers of control have occurred, the procedures and concerns expressed in *WHDH, Inc.*, 17 F.C.C.2d at 864, and in *Procedures on Transfer and Assignment of Licenses*, 4 R.R. 342 (1948), both cited by News International, are inapplicable.

[26] According to the *Ayers Directory of Publications (1981)*, *The Express* and *The News* are the only two daily newspapers published in San Antonio. *The Express* has a morning, Monday through Friday circulation of 79,901, while *The News* has an evening, Monday through Friday circulation of 75,340. The combined *Express-News* has a circulation of 127,249 on Saturday and 181,921 on Sunday.

[27] A chart depicting this chain of ownership is attached as Appendix B.

[28] Our action here is without prejudice to the pending proceeding on attribution. *Notice of Proposed Rulemaking (Docket No. 83-46)*, 48 Fed. Reg. 32773 (1983), That proceeding

Using that approach here, News International's interest in KMOL-TV will be 1.7 percent.[29] Nonetheless, such attributable minority interests are considered on a case-by-case basis. *See WHYN Stations Corp.*, 47 R.R.2d 663 (1980), and *Multiple Ownership*, above, 50 F.C.C.2d at 1076-77. In this case, News International owns Warner stock, but there are no common officers, directors or management-level employees. Its 8.5 percent interest in Warner does not give News International control or appreciable influence because of the wide dispersion of the remaining shares, and BHC's larger interest. Warner's interest in BHC, as noted above, is clearly subject to Chris-Craft's majority position. The goals of the multiple ownership rules are to promote competition in the media and diverse programming and viewpoints. *Multiple Ownership*, 22 F.C.C.2d 306, 307 (1970). We believe that the multilayered, limited interests involved here will not have any significant effect on those goals. We recognize that Warner may convert its interest to 42.5 percent and that News International may buy more Warner shares. These matters are in a state of flux, and it is more appropriate to consider them at renewal time when the ownership interests may be more stable.

37. *The Broadcast/Cable Cross Interests.* As noted at the outset, Warner Amex, with its numerous cable television systems, is owned 50 percent each by American Express and Warner. Further, BHC controls stations KCOP(TV) and KPTV(TV). The exchange of stock between Warner and BHC would result in Warner having attributable interests in KCOP(TV) and KPTV(TV), and in ten cable television systems colocated within the Grade B contour of those stations.[30] These common interests would violate section 76.501 of the Rules.[31] To avoid this problem, Warner

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examines, in part, the attribution of ownership interests, and is specifically considering adopting the multiplier approach as part of the multiple ownership rules.

[29] That result is reached by the following computation: News International's interest in Warner x Warner's interest in BHC = 0.085 x 0.2 = 0.017 = 1.7 percent. Because BHC controls United, the multiplier is not applied to that interest.

[30] The California cable television systems owned by Warner Amex, located within KCOP(TV)'s Grade B contour, and the number of subscribers of each, are: Big Bear Lake, 1,987; Crestline, 3,541; Lake Arrowhead, 1,792; Malibu, 2,189; and Wrightwood, 1,238. The number of subscribers of these systems totals 10,747. Similarly, the Oregon cable television systems and subscribers within the KPTV(TV) Grade B contour are: Hood River (includes Bingen and White Salmon, Washington), 2,182; Sandy, 405; and Weeme, 720. The number of Oregon subscribers totals 3,307. *Television and Cable Factbook (1982-83)*, Services Volume, pp. 388, 395, 411, 416, 450, 1138, 1148 and 1151.

[31] Section 76.501 provides in relevant part:

> (a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates or controls, or has any interest in:
>
> * * * * *

Amex sold[32] the ten cable systems to two new corporations, one acquiring the California systems and the other, the Oregon/Washington systems. Each of these corporations is wholly owned by yet another new company, Amex Cable Holding Company, Inc. ("Amex Cable"), in which American Express owns all of the voting stock. Some of the nonvoting stock will be held by Warner Amex and the remainder will be held by Warner through a wholly owned subsidiary.[33] Under the terms of the sale, the equity interests of Warner and American Express will remain the same, 50 percent each. Warner states that American Express will appoint the Board of Directors of Amex Cable and have the sole right to control of the cable television systems. Warner states that it will not exert any control over Amex Cable and that no officer, director or employee of Warner will be a director, officer or employee of the new corporations. Warner notes that the Commission has in some cases held that nonvoting stock interests are not attributable interests under the multiple ownership rules. That factor, plus the absence of shared officers, directors or employees, lead to the conclusion, according to Warner, that the cross ownership rules are inapplicable to the present case.

38. News International states that the necessary local approval for the transfer of control of the affected cable television systems has not been obtained, and concludes that the cable systems are still owned by Warner Amex. With regard to the transfer to Amex Cable, News International notes that no details of the transfer have been filed, such as the agreements between the parties, and the charter and by-laws of Amex Cable, and that the Commission requires full disclosure before deciding the applicability of section 76.501. Although the voting interest was transferred, the affected cable systems are still in the hands of an equal partner in other cable systems, not an independent company. The systems

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(2) A TV broadcast station whose predicted Grade B contour . . . overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers).

* * * * *

Note 2: The word "interest" as used herein includes, in the case of corporations, common officers or directors, and partial (as well as total) ownership interests represented by ownership of voting stock.

[32] By letter dated January 18, 1984, Warner advised us that, "prior to the closing and as represented in its Opposition pleading, Warner divested its voting interests in the California, Oregon, and Washington cable television systems identified in the Opposition."

[33] A chart depicting the new ownership of the cable television systems is attached as Appendix C. When the joint Warner/Chris Craft Opposition was first filed, we were advised that an additional affidavit regarding, in part, these facts would be submitted later. The affidavit was in fact submitted on January 13, 1984, and we accept the description of the proposed sale of the cable systems to Amex Cable.

transferred are described by News International as "part of an integrated system which shares facilities and programming and which is managed or controlled by the 'divesting' party." Our decisions in *Warner Amex Cable Communications Co.*, 75 F.C.C.2d 393 (1979), and *Cox Broadcasting Co.*, 78 F.C.C.2d 684, 703 (1980), are cited for the position that the "insulation" of the companies as proposed here is insufficient to comply with the cross ownership rules. Finally, News International submits copies of letters from Warner Amex to the franchising authorities of the transferred cable television systems that, in News International's view, establish that the proposed transfer will not result in any actual change in the ownership and control of the affected cable systems. The letter to the Clerk of the City of Big Bear Lake is set out below as illustrative of these letters.[34]

39. We reject the contention that Warner Amex still owns the ten affected cable television systems. Warner has expressly stated that the systems were transferred to Amex Cable prior to closing the agreement, and News International has presented no specific information, supported by affidavit, to the contrary. The transfers may have violated local ordinances, but that conclusion is not entirely clear. The relative equity interests of the voting and nonvoting shares remains unchanged, with Warner and American Express continuing to own 50 percent each. Only their voting interests have changed. We lack the authority or expertise to determine whether a transfer occurs under local laws where ownership of a cable television company changes from two entities with 50 percent voting and equity interests to the same companies with 50 percent equity interests, but with one holding all the voting shares. Such questions are properly left to local authorities. *See e.g., Cable TV Rules (Docket No. 21002)*, 71 F.C.C.2d 569, 571 (1979) (franchising standards are best reviewed by local officials) and *Texas Cablevision*, 33 R.R.2d 215, 216

[34] The relevant portions of the January 9, 1984 letter from Warner Amex to the Clerk are:

> As you know, the cable television system serving the City of Big Bear Lake is part of the nationwide family of cable companies in which American Express Company and Warner Communications, Inc. each hold a 50% interest. The Warner Amex cable television system in Big Bear Lake has been operated as an Illinois corporation - for organizational reasons it will be operated as a California corporation.
>
> The Big Bear Lake system continues to be owned equally (50/50) by American Express Company and Warner Communications, Inc. The local management of the system will remain fully in place and continue to provide Big Bear Lake residents with the quality service they have come to expect over the years. Naturally, we will continue to comply with our franchise commitments relating to the provision of cable television services and the payment of required fees and taxes.
>
> This letter is intended to notify you of this technical organizational change which we believe will have no effect on your cable television service.

(1975) (the Commission is not a "court of last resort" to resolve disputes with local officials on cable television matters).

40. We can now address the applicability of the rule to the facts presented. We do not generally consider nonvoting interests under the multiple ownership rules. We stated that position in *The Evening Star Broadcasting Co.*, 67 F.C.C.2d 318 (1978), and later made clear that *The Evening Star* policy applied in the cable television area. *Standard Corporation*, 87 F.C.C.2d 604, 609 (1981). *The Evening Star* case was expressly relied on by Warner and Chris-Craft in setting up the plan to divest the affected cable television systems. Further, because the common interests between Warner and American Express are through a subsidiary, Warner Amex, the applicability of the rule to the facts before us is not at all clear because the subsidiary does not "control" the parent. We need not decide that issue here because even if we conclude the rule does not strictly apply by its terms to the Amex Cable systems, that does not end our review. We have long held that entities or individuals with substantial common business interests cannot be expected realistically to compete at arm's length in other businesses. For example, in *Macon Television Co.*, 8 R.R. 703 (1952), we held that where competing radio stations in a community formed a joint venture to establish a television station in the same town, there were serious questions as to the compliance with the multiple ownership rules by the radio stations, and that the arrangement could not be accepted absent compelling circumstances. Similar concerns were expressed in *Warner Amex Cable Communications Co.*, above, 75 F.C.C.2d at 396-97. We found it unrealistic there to expect that directors could compartmentalize their thinking so as to work for common goals as to most of their business transactions, and then be expected to compete fully elsewhere. Although that case can be factually distinguished from the case before us, the concern is the same. We fail to understand how the directors and management of American Express and Warner can be equal partners in Warner Amex, with almost 1,246,000 subscribers, and then, without regard to their common interests, compartmentalize their decision-making processes as to their subsidiary (Amex Cable) and investment (BHC). Such independent action is implausible and beyond any kind of meaningful regulatory review. We find, therefore, that the transfer of Amex Cable does not comply with the purposes underlying the cross ownership rules and cannot stand.[35]

[35] We agree with News International that parties seeking waivers of section 76.501 need to submit full details of their proposals in advance. *Cox Broadcasting Co.*, above, 78 F.C.C.2d at 703. The parties in this proceeding did not seek such a waiver, apparently for the reasons outlined in the above paragraph. Given the conclusion we have reached, however, there is no need to require such details in this case.

41. That leaves the question as to how to resolve this problem. News International has suggested that we compel Warner and Chris-Craft/BHC to annul their agreement and return to the status prior to closing. It is readily apparent, however, that the transfer of the affected systems to Amex Cable is a small part of, and tangential to, the agreement under review here. Setting aside the entire agreement to resolve this problem would be administrative overkill. We do not wish, however, to have the ownership of the affected cable television systems stand as it is. We shall, therefore, request BHC, Warner, Warner Amex and Amex Cable to submit a joint report within 30 days of the release of this document as to the steps they propose to resolve the problem. While interim steps may be proposed, the goal is the ultimate disposition of the cable television systems to an independent party as promptly as possible. We expect the process to be completed within one year from the date of release of this document.[36]

42. *Misrepresentations/Lack of Candor.* In their opposition pleading, Warner and Chris-Craft stated:

> Prior to the closing of this transaction, Warner will divest itself of any interest in the affected cable television systems cognizable under Section 76.501. *See* Exhibit C, Affidavit of William K. Hoffman. Thus, there will be no violation of the Commission's cable/broadcast cross-ownership rules.

In its January 13 reply, News International stated that the above quotation "carries with it the necessary and material *implied* representation that [Warner and Chris-Craft] will undertake and obtain all necessary approval before they close the transaction, including *local* consent to the transfer of the systems . . . ." Emphasis added. News International concluded that its request for an expedited order prohibiting consummation of the Warner/Chris-Craft agreement "need not be acted on by the Commission at this time." In their letter of January 16, Warner and Chris-Craft stated:

> News International. . .repeatedly asserts that it is relying on the representations and assurances with News International itself has manufactured. In short, unable. . .to demonstrate any support for a stay, News International simply announces that Warner and Chris-Craft have, in effect, agreed to one. This is obviously false.

They then summarized their position as follows:

(a) consummation of the transaction, as described in our "Opposition," will not violate the Communications Act or the Commission's rules;

(b) prior FCC approval is not, and will not be, necessary for the consummation of the proposed Warner/Chris-Craft stock exchange;

(c) the parties therefore may consummate the transaction without such approval; and

[36] We assume in this case that the parties will choose to divest the cable television systems. The problem could also be resolved by divesting the two television stations.

(d) there is no valid basis for the Commission to interfere with the consummation of the transaction on either a temporary or permanent basis.

At a subsequent stage in the pleadings, News International notes that the transfer of the affected cable systems was described by Warner and Chris-Craft as a "divestiture" to us and, at the same time, as a "technical organizational change" to the local franchising authorities.

43. News International concludes from these statements that Chris-Craft and Warner have made misrepresentations to the Commission or were lacking in candor. From its perspective, "it sought to invoke positive Commission action to prevent the consummation of [the] agreement because of the violation of the Commission's rules would be created by the transaction unless local approval were first obtained." In that light, News International considers the numbered statements in the preceding paragraph "misleadingly evasive." Further, the disparate characterizations of the transfer of the affected cable systems that were made to us and to the local franchising authorities described as "dissembling conduct."

44. In considering these allegations, we note initially that this is not an applications proceeding in which parties are expected to provide specific information in response to specific questions. Warner and Chris-Craft were not required to spell out in detail and in advance their plans. Further, it was News International that made the inference that the transaction would not be consummated before local approval could be obtained. As noted above, the question as to whether local approval is in fact required is not for us to answer. In any event, if the plans of Warner and Chris-Craft were unclear to News International at first, the January 16 letter should have set the record straight. The language of that letter, portions of which are quoted above in paragraph 42, speaks for itself. The letter states that News International has "manufactured" the representations it relied upon. The position that Warner and Chris-Craft have effectively agreed to a stay "is obviously false," and the parties may consummate without Commission approval. There is no indication in the Warner/Chris-Craft letter to suggest that they would await local approval. The contrary conclusion is, in our view, a more reasonable reading of that letter. While we recognize that different statements were made to local officials and to us in describing the transfer of the cable television systems, those differences are consistent with the position taken by Chris-Craft and Warner. A shift in voting interests, while equity interests remain unchanged, may not be a transfer of control for the purposes of local laws. Warner Amex did describe to the local officials the fact that the cable systems would still be owned 50 percent each by Warner and Chris-Craft. We, on the other hand, in cases relied upon by Warner and Chris-Craft, have stated that nonvoting equity interests are not generally considered attributable interests under the cross ownership rules. The

fact that we have found the policies underlying the cross ownership rules are undermined by the transaction does not change our conclusion. A disagreement as to the applicability of the law is not a misrepresentation. In sum, we are unable to find that Chris-Craft and Warner made misrepresentations to us or were lacking in candor.

Conclusion

45. We have reviewed the pleadings carefully. Except as indicated above, we conclude that the public interest does not require action on our part at this time based on the record before us.

46. Accordingly, IT IS ORDERED, That the "Petition for Issuance of an Order to Show Cause, Declaratory Ruling, and/or Other Appropriate Relief," filed by News International plc, IS GRANTED to the extent indicated in paragraph 41, and IS DENIED in all other respects.

47. IT IS FURTHER ORDERED, That the "Petition for Expedited Temporary Relief" and the "Emergency Petition for Issuance of an Order to Restore the Status Ouo Ante," filed by News International plc ARE DISMISSED.

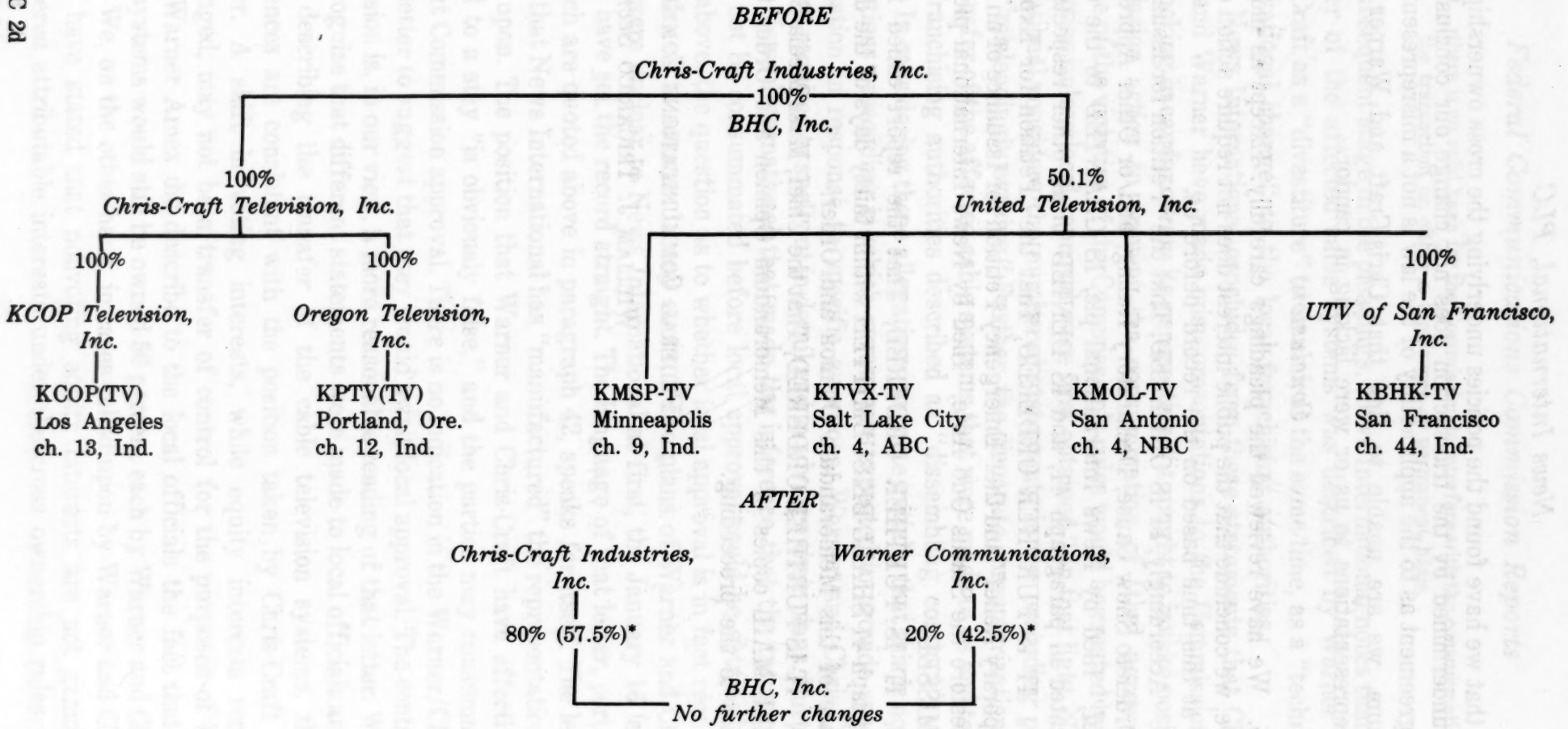
48. IT IS FURTHER ORDERED, That the report called for in paragraph 41 SHALL BE SUBMITTED within thirty days of the date of release of this Memorandum Opinion and Order.

49. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau SHALL MAIL copies of this Memorandum Opinion and Order to the parties to the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

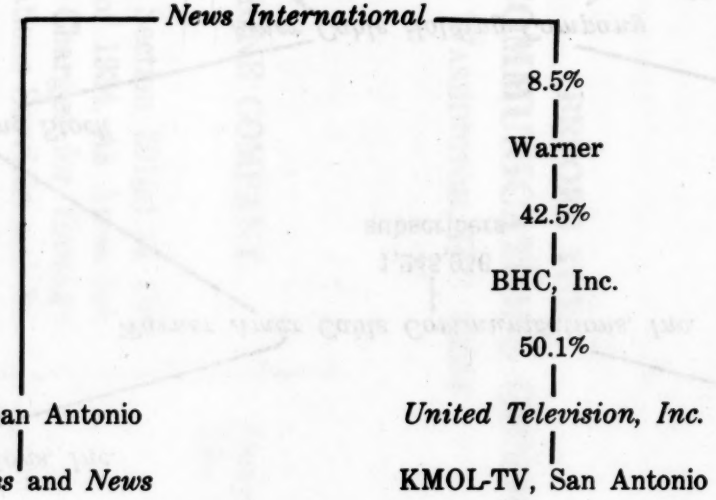
Changes in the Ownership of, and Stations Controlled by, BHC, Inc.



* The figures in parentheses apply if Warner changes its BHC convertible preferred stock into common stock after September 15, 1984.

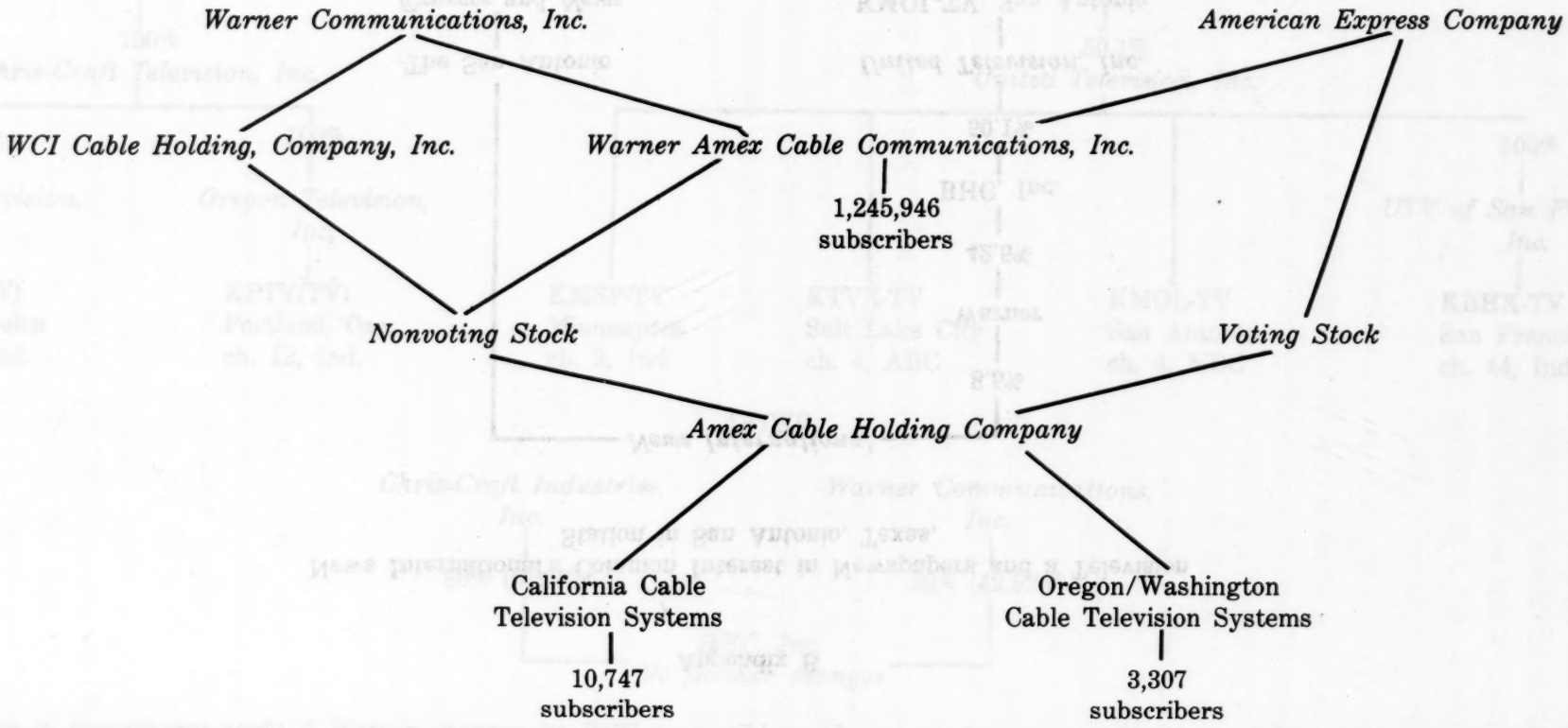
Appendix B

News International's Common Interest in Newspapers and a Television Station in San Antonio, Texas,



Appendix C

Corporate Structure of Affected Cable Television Systems



Common Carrier, Rates, Charges, See Also Tariffs
Common Carrier, Toll Sharing
Interstate Operations
Rule Making, Proceeding

Commission adopted, as modified, Initial Decision in rulemaking proceeding which determined that a common carrier failed to meet its burden of proof that it is necessary or desirable in the public interest pursuant to Section 201(a) of the Act, 47 U.S.C. § 201(a) to order the establishment of through rates and a division of charges. Exceptions are granted in part and otherwise are denied.
—*Offshore Telephone Co.*
Docket No. 21396

FCC 83-401

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of OFFSHORE TELEPHONE COMPANY Petition Pursuant to Section 201(a) of the Communications Act of 1934, As Amended, for Establishment of Charges for Through Interstate Communications Services and Division of Such Charges with South Central Bell Telephone Company and the American Telephone and Telegraph Company	Docket No. 21396 File No. TS 2-77

Decision

Adopted September 9, 1983; Released September 21, 1983

BY THE COMMISSION:

1. Before the Commission is the Initial Decision (ID) of Administrative Law Judge Frederic J. Coufal (FCC 80 D-43), released December 18, 1980, and exceptions thereto filed by the Offshore Telephone Company (OTC) and the Trial Staff of the Common Carrier Bureau (Trial Staff). After an evidentiary hearing, the ID concluded that OTC failed to demonstrate that it is necessary or desirable in the public interest for the Commission to

order, pursuant to Section 201(a) of the Communications Act, 47 U.S.C. §201(a), that South Central Bell Telephone Company (SCB) and American Telephone and Telegraph Company (AT&T) establish through rates and enter into a toll sharing agreement with OTC for the joint provision of interstate message telephone service between gas and oil production platforms located in OTC's service area in the Gulf of Mexico and the mainland United States.[1] As explained below, although we adopt the ultimate conclusion of the ID, we do so for reasons other than those relied on by the ALJ. We shall, therefore, adopt the ID as modified below.

Scope of this Proceeding

2. This rulemaking proceeding resulted from a complaint filed by OTC against SCB and AT&T. OTC alleged that SCB had refused OTC requests to enter into a separations based settlement or traffic agreement[2] similar to those that exist between AT&T, Bell System Operating Companies (BSOCs), and independent telephone companies for a division of revenues obtained in the joint provision of interstate telecommunications services, in particular AT&T's interstate Message Telecommunications Service (MTS).[3] With respect to interstate MTS, a separations based settlement agreement is predicated on interstate MTS being provided at the nationwide uniform through rates found in Schedule I of AT&T Tariff

[1] Also before us are reply exceptions filed by OTC, the Trial Staff, and SCB/ATT. The Trial Staff's motion for acceptance of amended exceptions and reply exceptions, supplying a table of contents and a table of citations is granted. OTC has requested oral argument on the exceptions. We deny OTC's request because we do not believe oral argument would significantly enhance our ability to render a decision. OTC has also filed a request for an emergency order which would require SCB and AT&T to submit a formal statement on whether this proceeding is rendered moot by the Consent Decree in U.S. v. American Telephone and Telegraph Co., Cir. Nos. 74-1698 and 82-0192, ____ F. Supp ____ (D.D.C. 1982). Additionally, OTC has filed a related request for official notice of extracts from the Department of Justice (DOJ) Competitive Impact Statement on the Consent Decree. We find that OTC has failed to set forth any emergency conditions warranting the demanded relief and that the DOJ extracts are not relevant to consideration of matters raised in this proceeding. Therefore, we deny OTC's requests.

[2] A separations based settlement agreement is an agreement between carriers in which revenue generated from the joint provision of an interstate service is divided on the basis of the expenses and investments of each carrier as determined by the Separations Manual incorporated in Part 67 of the Commission's Rules, 47 C.F.R. § 67.

[3] Although the complaint initially requested through rates and a division of charges with respect to all of OTC's services, the only relief ultimately sought by OTC in presenting its case in this proceeding was with respect to the joint provision of MTS. We, therefore, have confined our factual presentation and consideration of whether through rates and a division of charges should be established to the joint provision of interstate message telephone service.

F.C.C. No. 263, Message Telecommunications Service.[4] OTC, which currently provides interstate message telephone service on an end-on-end rate basis with SCB and AT&T,[5] desired to concur in AT&T Tariff F.C.C. No. 263 to provide interstate MTS to its subscribers at Schedule I rates. However, AT&T refused to accept OTC as a concurring carrier. OTC alleged that the refusals by SCB and AT&T result in unlawful discrimination under Section 202(a) of the Communications Act, 47 U.S.C. §202(a), because OTC subscribers have to pay more for interstate message telephone service on an end-on-end rate basis than subscribers of other telephone companies allowed to concur in the Schedule I through rates. OTC further alleged that its stockholders suffer unfair losses because the revenues OTC collects and retains in the end-on-end rate arrangement are less than it would receive under a separations based settlement agreement with SCB. OTC requested the Commission to order through rates and a reasonable settlement agreement pursuant to Section 201(a) of the Act, 47 U.S.C. §201(a).[6] It subsequently amended its complaint to request damages for past refusals to establish through rates and a reasonable toll settlement agreement.

3. In designating this matter for hearing as a rulemaking proceeding, the Commission considered the primary relief requested by OTC to be a Commission order to establish through rates and a division of charges pursuant to Section 201(a) of the Act. *Offshore Telephone Company*, 66 FCC 2d 184 (1977), clarification, 68 FCC 2d 63 (1978). Under Section 201(a) there is no duty on the part of a carrier to establish through rates and a division of charges unless the Commission makes an affirmative finding that they are necessary or desirable in the public interest. Since any public interest action taken pursuant to Section 201(a) by the Commission is one of future effect, the Commission reasoned that pursuant to Sections 551(4) and 551(5) of the Administrative Procedure Act, 5 USC §§551(4) and 551(5), the Section 201(a) public interest issues raised by OTC's complaint

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[4] Schedule I rates are message rates where the rate for any individual message varies by time of day, message duration, and mileage between originating and terminating points. In addition to the basic message charge, service charges apply for operator assistance when making collect, third number billing, credit card, and person to person calls.

[5] An end-on-end rate arrangement is one where the total charge for a through service consists of separate charges for individual portions of the service provided by one or more carriers.

[6] Section 201(a) of the Act provides: It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

were rulemaking issues which should be considered separate from the adjudicatory issues of alleged unlawful discrimination under Section 202(a) and claimed damages resulting therefrom. Therefore, the restricted rulemaking proceeding now before us was instituted to first resolve the following Section 201(a) public interest issues:

(a) whether Offshore's requests for the establishment of through charges and the division of such charges are reasonable;

(b) whether it is necessary or desirable in the public interest to establish through charges and the division of such charges; and

(c) what charges and divisions, if any, should be established.

The Commission placed the burden of proof on OTC because it is the party seeking affirmative relief under Section 201(a). The Commission deferred the other issues in OTC's complaint, alleged violations of Section 202(a) and damages, to a subsequent proceeding should OTC indicate its intent to pursue these claims following a resolution of the Section 201(a) public interest issues.

OTC Operations and Current Rates

4. OTC is authorized pursuant to Section 214 of the Act, 47 U.S.C. § 214, to provide common carrier communication services through the operation of submarine cable, microwave, rural radio, and Offshore Radio Telephone Service (ORTS) facilities in an area in the Gulf of Mexico primarily located south of Louisiana and eastern Texas and beyond the territorial waters subject to the jurisdiction of these states. (OTC Exhibit A, Att. A 4). The points served in this offshore area are platforms used by oil companies and related firms for the exploration, drilling, and production of oil and gas in the Gulf. There are both manned and unmanned platforms. The manned platforms are equipped with facilities for meals and lodging and are inhabited by oil company employees generally for a seven-day tour of duty. As of 1978 there were some 2,323 platforms in the Gulf of which 432 were manned by approximately 10,000 people on a rotational basis. (TS Exhibit 7, p. 3). Of these, OTC indicates that it serves approximately 100 locations and some 2400 people at any one time. (OTC Exhibit A-3, Tr. 612-613).

5. OTC provides message telephone service, foreign exchange (FX) service, and other private line service to the oil platforms. As best we can ascertain from the record, these services are used predominantly, if not totally, to communicate with points on the mainland United States.[7] Thus, the overall use of OTC plant and facilities is for interstate communications. OTC interconnects on the mainland with SCB at Morgan City,

[7] OTC is unaware of the use of its network to provide communications between subscribers at different locations in OTC's service area. (Tr. 404, 448-449, and 668).

Louisiana, Cameron Telephone Company at Creole, Louisiana, and La Fourche Telephone Company at Grand Isle, Louisiana. (OTC Exhibit A and Att. A 4; SCB/AT&T Exhibit 5; Tr. 429, 596, and 673). As of January 5, 1979, OTC interconnected with the mainland telephone companies through approximately 57 FX lines, 37 private lines, and six message telephone trunk lines. These message telephone trunk lines serve approximately 27 telephones, three of which are similar to coin operated pay telephones (hereinafter referred to as platform personnel telephones). (SCB/AT&T Exhibit 3, Att.2; TS PFF pp. 30-32; Tr. 1525-1526). Interstate message telephone service is provided only through OTC's interconnection with SCB at Morgan City. (Tr. 640-641).

6. Under the current interconnection and end-on-end rate arrangement that exists between OTC and SCB, interstate message telephone calls that originate from OTC's service area are first transmitted from a platform location to an OTC operator located in Morgan City. The OTC operator takes billing information on the call for entry in OTC's log and then connects the caller to SCB's operator who also takes billing information on the call, (*i.e.*, collect, third party or credit card). The SCB operator then completes the call. The OTC customer usage charge for a call terminating in the Morgan City exchange area is $4.50 for the first three minutes and $1.50 for each additional minute or fraction thereof. In addition, SCB charges OTC 50 cents per call to perform timing, ticketing, and billing functions. If a call terminates beyond Morgan City, the same OTC customer usage charges apply in addition to the applicable Schedule I toll charges found in AT&T Tariff F.C.C. No. 263 for transmitting the call from Morgan City to its terminating point. OTC is not charged 50 cents by SCB for this type call. In addition to usage charges, OTC subscribers pay a monthly service charge of $900.00. (OTC Exhibit A, p. 13; SCB/AT&T Exhibit 5, p. 27, Att. 5; Tr. 522, 523, 602, 603; OTC Tariff F.C.C. No. 2).

7. It appears from the record that the only subscribers to OTC's message telephone service are oil and gas companies. There is no indication that individual employees are subscribers. Workers making message telephone calls for non-business purposes use either the three platform personnel telephones or their employer's message telephone service. In the latter instance, the worker generally pays only the toll charge for the portion of any call beyond Morgan City. The OTC customer usage charge is paid by the subscriber. Workers are also generally allowed to use their employer's FX and private line service for non-business calls. Here, too, the workers pay only mainland interstate toll charges when applicable. (Tr. 139 and 217-218).

Major Contentions Of The Parties

8. Several reasons have been advanced by OTC in support of the public interest necessity or desirability of the Commission ordering the establishment of through rates and a division of charges. OTC argues that the high quality transmission provided through its message telephone service is essential to the oil industry for purposes of conducting its business operations and providing for the safety of the individuals who work in the Gulf area. OTC submits that message telephone service is necessary for the morale of employees who find it important to communicate with their families on the mainland. OTC contends that both business and personal use of message telephone service has been limited because of the high cost to subscribers and individuals using this type communication. In this regard, OTC asserts that the establishment of through rates and a division of charges with SCB and AT&T would stimulate utilization, result in a substantial reduction of charges, enable OTC to expand its message telephone service so as to better satisfy the needs of the oil industry and individuals working in the Gulf area, and promote the national interest in the production of energy. These contentions are premised solely on OTC's belief that the appropriate through rates are those found in Schedule I of AT&T Tariff F.C.C. No. 263 and that the appropriate division of charges is a separations based settlement agreement similar to those that exist between AT&T, BSOCs, and independent telephone companies on the mainland of the United States. This type arrangement would permit OTC to be included in the division of revenues/settlements and separations process of mainland telephone companies. Under this process telephone company customers pay nationwide averaged through charges based on the associated costs of participating carriers and the participating carriers share revenues from an interstate toll pool based on their respective costs, as derived from the Separations Manual, plus a reasonable rate of return. OTC expects that inclusion in this process will generate toll settlement revenues in excess of what it now collects through its end-on-end rate arrangement with SCB and AT&T. OTC asserts that this type of through charge and divisions arrangement and inclusion in the mainland interstate toll process is mandated by Commission policy and the long-standing recognition by the Bell System of the goal of achieving universal service.

9. SCB/AT&T and the Trial Staff maintain that OTC's message telephone service is nothing more than a unique, high cost, end-link type service accessing the interstate toll network to meet specialized requirements of a limited customer body for which there is no public interest necessity or desirability in establishing through rates and a division of charges. They submit that the current end-on-end rate arrangement with OTC should be retained because it is lawful and similar to that which

exists for other specialized services, such as mobile land, marine, and aviation services; special construction services; and exception rate private line services. They further argue that the establishment of Schedule I through rates and a separations based toll settlement agreement is not appropriate for OTC's message telephone service because such specialized, high cost services are not now included in the mainland interstate toll process. SCB/AT&T and the Trial Staff also assert that inclusion in the mainland interstate toll process is not warranted because the predominantly interstate calling characteristics of OTC customers are unlike the calling characteristics of mainland telephone company customers which are primarily among subscribers within a local exchange area. In this regard, they argue that OTC customer calling characteristics in combination with OTC's high costs of providing service would place an unreasonable burden on the general body of interstate telephone service customers. Finally, SCB/AT&T and the Trial Staff maintain that, even if OTC had demonstrated the public interest necessity or desirability of establishing through rates and a division of charges, the most appropriate arrangement would be a separate through rate schedule reflecting the higher cost of service between the United States mainland and OTC's service area and a settlement agreement reflecting each carrier's proportion of the total cost to provide such service.

Initial Decision

10. The ID concluded that OTC had not met its burden of proof in this proceeding because it had failed to demonstrate the public interest necessity or desirability of the Commission ordering the establishment of through rates based on Schedule I rates and a division of charges based on a separations based settlement agreement. (ID para. 66). General findings as to the overall public interest necessity or desirability of through rates and divisions of charges, aside from what kind of charges and divisions might be established, are not apparent from the ID. There is some suggestion in the ID that the record evidence was insufficient to make such general findings. (ID para. 53). In any event, the ALJ stated that the overriding consideration in determining whether the Schedule I through rate arrangement should be established was costs. In this regard, the ALJ found that the plant investment and maintenance costs of providing OTC's service was extremely high in comparison to mainland telephone companies. Based on his comparison of these costs, OTC's reported operating revenues of $1,539,694 for 1977, and OTC's estimation that it would have received a net toll settlement of $2,764,307, the ALJ determined that the establishment of a Schedule I through rate arrangement would place an unreasonable cost burden on the mainland interstate toll process. The ALJ further found that OTC had not shown that this

unreasonable cost burden would be reduced by increased revenues through stimulated demand resulting from reduced rates to OTC customers under a Schedule I through rate arrangement. (ID para. 57-61).

Exceptions

11. On exceptions OTC maintains that the ID should be reversed because the determination not to order Schedule I through rates and a separations based settlement agreement was based solely upon conclusions regarding OTC's costs, revenues, and burden on the interstate rate pool. OTC questions the use and relevance of these factors by reiterating its argument that Commission policy and the longstanding recognition by the Bell System of the goal of achieving universal service requires the establishment of Schedule I through rates and inclusion in the interstate toll process. It claims that additional support for this position is found in *MTS and WATS Market Structure, Report and Third Supplemental Notice* (*Report and Third Supplemental Notice*), 81 FCC 2d 177 (1980), which was adopted by the Commission subsequent to the ID. OTC's position here is apparently premised on the belief that the ALJ had initially found that OTC had made an overall public interest showing requiring the establishment of through rates and a division of charges, but eventually changed his mind because of his conclusion that it would be inappropriate to specifically order Schedule I through rates and a separations based settlement agreement. In this regard, OTC argues that once it met its burden of proof that through rates and a division of charges were in the public interest, the burden shifted to SCB and AT&T to show why OTC was being excluded from the interstate toll process, a burden which OTC maintains has not been met. (OTC Ex. pars. 5-7, 32-35). Alternatively, assuming the relevancy of costs, revenues, and potential burden on the interstate rate pool, OTC argues that the ID overstated costs, understated revenues and exaggerated its potential burden on the pool.

12. While the Trial Staff agrees with the ID's findings regarding OTC's costs, revenues, and potential burden on the interstate rate pool, it argues that additional findings should be made in support of the ID's conclusion not to order the establishment of Schedule I through rates and a separations based settlement agreement. Specifically, the Trial Staff seeks findings that OTC's service is a specialized, end-link, high cost service which should not be included in the interstate toll process. The Trial Staff also seeks a finding that inclusion in the interstate toll process is not warranted because OTC does not provide message telephone service between customers within its exchange area as do other mainland telephone companies partaking in the interstate toll process. Finally, the Trial Staff seeks a finding that even if OTC's request were in the public

interest, OTC's revised Form M is unreliable and cannot be used as a basis for classification of OTC services and costs for purposes of toll sharing. AT&T/SCB, in a reply to the exceptions of the other parties, support the adoption of the Trial Staff's position.

Discussion

13. The primary issue to be decided is whether it is necessary or desirable in the public interest for the Commission to order the establishment of through rates and a division of charges between OTC, SCB, and AT&T for the joint provision of interstate message telephone service. Interstate carriers providing reasonable interconnection of their facilities with those of another carrier for purposes of furnishing interstate communications have generally utilized either of two compensation arrangements: (1) through charges and a division of those charges with the other carrier, or (2) an end-on-end rate arrangement where each carrier collects and retains revenues. Either arrangement can be reasonable and lawful under the Act. In this sense, a decision to establish through rates and divisions has been generally a matter of negotiation between the carriers. However, the Commission is empowered under Section 201(a) of the Act to order the establishment of through rates and a division of charges, but only upon finding that it is necessary or desirable in the public interest.[8] In this proceeding, therefore, it was incumbent upon OTC, as the proponent carrier seeking Commission action pursuant to Section 201(a), to specify clearly the overall public interest factors which the Commission should consider and demonstrate why these factors require the establishment of through rates and a division of charges with SCB and AT&T. Only if OTC meets its burden of proof on this issue does it become relevant to consider the issue of what particular through charges and divisions should be established.

14. OTC suggests in its exceptions that it met its burden of proof on the overall public interest issue, that the ALJ initially so concluded, but eventually changed his mind because he found that Schedule I through rates and a separations based settlement agreement should not be established. We believe such an analysis of the ID is erroneous. Our reading of the ID indicates that the ALJ found the record inadequate to make any findings on the public interest necessity or desirability of establishing through charges and divisions in this particular situation. In this regard, the ID states at paragraph 53:

> Two matters are noted. The first is that the Commission designated no issue with respect to the need for a telephone system in the Gulf. This presumably, is because

[8] c.f. Lincoln Tel & Tel Co. v. F.C.C., 659 F 2d 1092 (D.C. Cir. 1981), where the Court affirmed decisions by this Commission which ordered interconnection between carriers pursuant to Section 201(a) and subsequently ordered terms and rates for interconnection once the carriers failed to reach agreement between themselves.

> determination of that need was made in the Commission's February 23, 1966 Order and Certificate (licensing OTC's predecessor) . . . . It is also noted that while the designation order directs charges to be fixed if a conclusion is reached that through charges are appropriate, there is no evidence in the record respecting the reasonableness of, necessity for, or public interest in, any through charges other than those in Schedule I. . . .

A Commission finding pursuant to Section 214 of the Act that the public convenience and necessity require the construction or acquisition of communications lines in the Gulf area does not equate with the public interest necessity or desirability of establishing through rates and a division of charges. Furthermore, we cannot infer, as OTC suggests, that the closing language in the passage quoted above shows that the ALJ summarily concluded that OTC had met its burden of proof on the overall public interest issue. We believe that the only conclusion that reasonably can be drawn from the language is that the ALJ was confronted with a record where the preponderance of the evidence introduced by OTC related only to what particular through charges and divisions should be established. The remainder of the ID's discussion appears then to center on a consideration of why Schedule I through rates and a separations based settlement agreement should not be established. Thus, it is fair to state that the ID does not make clear findings on the overall public interest issue. We shall, therefore, address this issue by performing our own analysis of the record in light of the standards of the Communications Act and the major contentions of OTC.

15. In seeking to show the public interest necessity or desirability of establishing through rates and a division of charges with SCB and AT&T for interstate message telephone service, OTC has relied heavily on the need for adequate interstate communications by the oil and gas industry which it claims is vital to the national interest. However, the record does not reflect that the overall interstate communications needs of the oil and gas industry are not being satisfied or that energy production in the Gulf area has been affected in any way because of the currently existing end-on-end rate arrangement for interstate message telephone service. From the breakdown of OTC's interstate service offerings, as noted above in paragraph 6, it appears that the oil and gas companies rely primarily on OTC's FX and private line services, rather than message telephone service, to satisfy their high quality interstate transmission needs. Further, OTC has failed to adduce any evidence from the oil and gas companies in its service area that they would be unable to satisfy future interstate communication needs unless OTC establishes through rates with mainland telephone companies for interstate message telephone service. Thus, OTC failed to support its general allegation with any specific evidence.

16. As for oil company employees, we similarly find that there has been no persuasive showing by OTC that their personal interstate communications needs are not being satisfied because of the current end-on-end rate arrangement for message telephone service. Nor has it been established by OTC that the cost to employees of satisfying their personal interstate communication needs is prohibitive. From what we can ascertain, it does not appear that the three personnel platform telephones are the primary means by which employees make personal interstate calls. Rather, it appears that an employee is most likely to use either his employer's message telephone service or his employer's FX or private line services and pay only the mainland interstate toll charges. Apparently, the oil companies view such use as being reasonable under their conditions of employment and are willing to pay OTC's portion of any interstate charge. Furthermore, there is nothing in the record which suggests that individual employees who inhabit the manned platforms on a rotational basis now desire or would seek to become full time subscribers to OTC's message telephone service if through rates, resulting in reduced usage and service charges, were established with mainland carriers. In short, no clear relationship has been established by OTC between communication needs of the oil and gas industry or its employees in the offshore area and the alleged public interest need or desire for through rates and a division of charges.

17. OTC also argues that the establishment of through rates and a division of charges with SCB and AT&T would result in a substantial reduction of charges, thereby stimulating greater demand and eventual expansion of its interstate message telephone service in the Gulf area. We find, however, that there is no basis in this record for concluding that OTC's overall service objectives would be accomplished by the establishment of through rates and a division of charges. The only evidence provided by OTC in support of its assertion relates solely to the establishment of Schedule I through rates.[9] This evidence consists of general assumptions by OTC's witnesses, Mr. Ende and Mr. Bushnell, that the effect of reduced charges would be a significant increase in usage of OTC's message telephone service. (OTC Exhibits B and C). As a general economic principal, lower prices may increase demand. In this case, however, OTC has not provided any demand elasticity or other studies which either substantively support its witnesses' testimony regarding the effects of establishing Schedule I through rates or generally shows the effects that reduced charges of any kind would have in relation to present and future levels of demand, plant capacity, investment needs, and the overall communication needs of the customer body in the area being

[9] See our discussion below in paragraph 20 relating to the inapplicability of the Schedule I through rates.

served. The general testimony on this issue, therefore, simply fails to prove OTC's assertion.

18. Throughout this proceeding OTC has also maintained that through rates and a division of charges are required because of Commission policy and the long-standing recognition by the Bell System of the goal of achieving universal service. In particular, OTC points to Section 1 of the Act, 47 U.S.C. §151, which articulates the purpose of the Commission to "make available, *so far as possible*, to all the people of the United States a rapid, efficient, nationwide and worldwide wire and radio communication service *with adequate facilities at reasonable charges*." (Emphasis added). However, we have never found, nor has OTC provided us with any reason to find, that the establishment of through rates and a division of charges is necessary to achieve the purposes of the Act. If that were the case, then the Commission would have no discretion in making the public interest determination required by Section 201(a) of the Act. In the present instance, taking into account the apparent expense and difficulties of providing communication service to the offshore area, OTC has failed to establish that the communication needs of the oil and gas industry and its employees are not now being adequately satisfied or that charges are unreasonable or prohibitive under an end-on-end rate arrangement.

19. Furthermore, we cannot agree with OTC that through rates and a division of charges must be ordered because of the Commission's *Report and Third Supplemental Notice, supra*. In this decision, we discussed, in part, the effects of competitive entry upon interstate MTS rates. Contrary to OTC's interpretation, our discussion did not prohibit route-by-route pricing of MTS by AT&T. *Report and Third Supplemental Notice, supra*, at 188-195. Moreover, the issue before us is not concerned with the effects of competitive entry upon interstate MTS rates, but rather the overall public interest necessity or desirability of establishing through charges and divisions under Section 201(a) of the Act between OTC, SCB, and AT&T. To this extent, we find, not only that OTC has misinterpreted *Report and Third Supplemental Notice, supra*, but its reliance on this report to support its position in this proceeding is misplaced.[10]

20. Finally, even if OTC had made an overall showing that the establishment of through rates and a division of charges are necessary or desirable in the public interest, we question what appears to be OTC's basic assumption throughout this proceeding that the only appropriate through rates and a division of charges must be the Schedule I through

[10] Also, to the extent OTC argues that we should order through rates and division of charges because AT&T permits virtually all independent telephone companies to concur in its Schedule I rates, such an argument relates to potential discrimination under Section 202(a) which we specifically excluded from this proceeding.

rates and a separations based settlements agreement. The uniform mainland through rates for interstate MTS found in Schedule I of AT&T Tariff F.C.C. No. 263 reflect the fact that revenues collected under this schedule are divided among participating mainland telephone companies based on their respective interstate investments and expenses as derived from the Separations Manual. Although the Separations Manual has historically been used as a basis for revenue allocations among mainland telephone companies providing AT&T interstate MTS, its primary purpose is to allocate investments and expenses of telephone companies between interstate and intrastate jurisdictions to form a basis for regulatory review of interstate rates by this Commission and intrastate rate by state regulators.[11] As noted, OTC is a communications common carrier with authority to operate facilities from a service area subject only to federal jurisdiction. Since there is no indication on the record that OTC's services and rates are subject to the jurisdiction of any state, it is unlikely, had we decided to order the establishment of through rates and divisions, that we would have chosen Schedule I through rates and a separations based settlements agreement similar to those that exist between AT&T, BSOCs, and independent telephone companies on the mainland for interstate message telephone service.[12]

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[11] The allocation of investment and expenses among jurisdictions is required because the power to regulate is divided among jurisdictions. See, *Minnesota Rate Cases, 230 U.S. 352(1913) and Smith v. Illinois Bell Telephone Co.*, 282 U.S 133(1980). Agreement on how to allocate investments and expenses is accomplished through a Federal-State Joint Board convened pursuant to Section 410 of the Communications Act, 47 U.S.C. §410.

[12] Of particular concern to this Commission and the states is the manner in which the Separations Manual allocates costs associated with common exchange plant used in both interstate and intrastate services. The present formula in the Separations Manual for allocating common exchange plant costs is referred to as the Subscriber Plant Factor (SPF). SPF was developed as part of a Federal-State Joint Board negotiated agreement known as the Ozark Plan. The Ozark Plan was adopted by the Commission and incorporated into the Separations Manual in 1970. See, Prescription of Procedures For Separations and Allocating Plant Investment, Operating Expenses, Taxes and Reserves between the Interstate Operations of Telephone Companies, 26 F.C.C. 2d 247 (1970). The SPF formula reflects compromises made under the Ozark Plan between federal and state jurisdictions that were result oriented. SPF was designed to provide a specific level of compensation to local telephone companies for interstate use of facilities which are also used for local exchange service. As such, SPF embodies a heavy weighting of interstate message service resulting in a threefold assignment of costs to the interstate jurisdiction. (The Commission froze SPF at the average 1981 annual percentage level, effective January 1, 1982, in Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 89 FCC 2d 1). It would seem to be inappropriate, therefore, to apply jurisdictional separations to OTC for purposes of a settlement agreement based on through charges because the SPF formula was designed for mainland telephone companies whose customer calling characteristics are predominantly intrastate between subscribers within a local exchange area. As noted, OTC customer calling characteristics are predominantly, if not totally, interstate.

21. In sum, we find that OTC has not met its burden of showing that it is necessary or desirable in the public interest for this Commission to order, pursuant to Section 201(a) of the Act, the establishment of through rates and a division of charges between OTC, SCB, and AT&T. Since OTC has not met its burden of proof on the overall Section 201(a) public interest issue raised in this proceeding we find no reason to consider the issue of what particular through charges and divisions should be established. Therefore, we shall adopt the ID's conclusions as modified above, deny OTC's exceptions, and grant the Trial Staff's exceptions to the extent indicated above.

22. Accordingly, IT IS ORDERED, That the Initial Decision of Administrative Law Judge Frederic J. Coufal IS ADOPTED as modified above;

23. IT IS FURTHER ORDERED, That the request of Offshore Telephone Company for a Commission order, pursuant to Section 201(a) of the Communications Act, 47 U.S.C. §201(a), for the establishment of through rates and a division of charges IS DENIED;

24. IT IS FURTHER ORDERED, That the request for oral argument, the request for special emergency order, and the request for official notice filed by Offshore Telephone Company ARE DENIED;

25. IT IS FURTHER ORDERED, That the motion for acceptance of amended exceptions and reply exceptions filed by the Trial Staff IS GRANTED;

26. IT IS FURTHER ORDERED, That the exceptions filed by the Offshore Telephone Company ARE DENIED;

27. IT IS FURTHER ORDERED, That the exceptions filed by the Trial Staff ARE GRANTED to the extent indicated above and otherwise are DENIED; and

28. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

29. IT IS FURTHER ORDERED, That, if OTC intends to pursue any remaining matters which are the subject of its complaint, it shall file within 30 days of the release of this decision a notice to that effect,

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Recently, in *MTS and WATS Market Structure, Third Report and Order (Access Charges)*, FCC 82-579, released February 28, 1982, we have ordered the subsequent replacement of industry devised contractual arrangements of "divisions" and "settlements" with a combination of carrier and end user charges. It is unnecessary to consider the effects of *Access Charges, supra*, in this proceeding since we have determined not to order through rates and a division of charges.

together with a brief supporting its position in light of the decision herein. AT&T and SCB may respond within 10 days thereafter.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

FCC 80D-43

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Petition of Offshore Telephone Company Pursuant to Section 201(a) of the Communications Act of 1934, as Amended, For Establishment of Charges for Through Interstate Communications Service And Division of Such Charges with South Central Bell Telephone Company and American Telephone and Telegraph Company.	Docket No. 21396 File No. TS 2-77

Appearances

Charles H. Kivett, Edgar Mayfield, Edmund B. Raftis, Gary A. Swenson, and *A.M. Schlesinger* on behalf of American Telephone and Telegraph Company; *Thomas W. Moore* and *Robert W. O'Neill* on behalf of South Central Bell Telephone Company; *Robert W. Healy, Robert E. Levine, William H. Roberge,* and *Larry Miller* on behalf of The Offshore Telephone Company; *Thomas J. O'Reilly* on behalf of the United States Independent Telephone Association; *Jack R. Smith* on behalf of Business Communications Inc.; and *Giovanna M. Longo* and *David G. Richards* on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

Initial Decision of Administrative Law Judge Frederic J Coufal

Issued December 12, 1980; Released December 18, 1980

Preliminary Statement

1. The parties to this proceeding are Offshore Telephone Company (OTC), South Central Bell Telephone Company (SCB), American Telephone and Telegraph Company (AT&T), United States Independent Telephone Association (USITA), and the Chief, Hearing Division, Common Carrier Bureau.

2. On December 28, 1976 OTC filed a complaint naming SCB and AT&T as defendants and alleging that OTC is a common carrier providing

message telephone service to various platforms[1] in the Gulf of Mexico; that it interconnects with SCB onshore in Louisiana; that the existing rate structure is an end-on-end arrangement with an OTC rate on that part of the service from the platform to the SCB connection and an SCB or AT&T rate from the connection point to the onshore telephone; that all calls placed offshore must be billed at the highest rate in the Bell system tariff; that SCB has refused to accede to OTC's requests for uniform through rate and toll sharing agreements; and that such refusal unlawfully discriminates against users of the OTC system and results in unfair and illegal losses to the OTC shareholders. The relief sought by OTC is the extension to it of the nationwide uniform rate schedule and a division of charges in the manner that now exists with respect to Bell companies and other independent telephone companies. An amendment to the complaint dated March 11, 1977 added a prayer for damages for SCB's failure to enter into a toll settlement arrangement with OTC. SCB and AT&T answered the complaint on May 4, 1977 (amended May 16, 1977) by denying substantial parts thereof and alleging among other things that the interest of the rate paying public would not be served by including the unique and expensive OTC operations in through rates toll settlements.

3. The Commission, in a Memorandum Opinion and Order released September 23, 1977 (FCC 77-628), designated the following issues for hearing:

(a) whether Offshore's requests for the establishment of through charges and the division of such charges are reasonable;

(b) whether it is necessary or desirable in the public interest to establish through charges and the division of such charges; and

(c) what charges and divisions, if any, should be established

It deferred action on the damage question until resolution of the designated issues and ordered the Chief, Hearing Division, Common Carrier Bureau, to be made a party.

4. On October 21, 1977 USITA petitioned to intervene alleging that it has often been a participant in negotiations with AT&T regarding intercompany toll settlements and that it could be of assistance. On October 27, 1977 Business Communications, Inc. petitioned to intervene alleging that it offers message telephone service in the Gulf through rural radio service, that it has applied to offer such service through use of offshore radiotelephone, that it has and will interconnect with SCB, and that it (like OTC) should have through charges and a settlement agreement. By Memorandum Opinion and Order released November 18,

[1] "Platform" will be used to describe any location in the Gulf used for petroleum exploration, drilling, production, and satellite service though the locations vary from anchored ships to structures resting on legs extending to the sea bottom.

1977 (FCC 77M-1963) USITA was admitted as a party but the Business Communications, Inc. petition was denied.

5. The Commission released a Memorandum Opinion and Order on April 27, 1978 (FCC 78-271) in response to an order of certification (FCC 77M-2016) by the then presiding judge. The Commission clarified its designation order by characterizing this proceeding as a restricted rulemaking proceeding and placed the burden of proof on OTC. It also deferred questions of possible past violations of Section 202(a) of the Communications Act of 1934, as well as damages, to a proceeding to be held after the rulemaking questions have been resolved.

6. Informal discovery was pursued and the case moved through the usual prehearing events. OTC served exhibits for its direct case on September 6, 1978 and its witnesses were cross-examined October 23-27, 1978; the Trial Staff, SCB and AT&T served their exhibits on January 15, 1979 and their witnesses were cross-examined March 26-29, 1979; OTC's rebuttal evidence, which involved no witnesses for cross-examination, was offered on August 7, 1979. The record was closed on September 4, 1979 (FCC 79M-1019) but was reopened by Order released February 28, 1980 (FCC 80M-341) pursuant to a Staff motion that an additional exhibit be received. It was closed again by order released December 9, 1980 (FCC 80M-2552).

Findings of Fact

The OTC Service Area

7. OTC provides communications service to offshore locations in the Gulf of Mexico bounded on the seaward side by the edge of the continental shelf [OTC Exhibit A, Att. A(4)] and on the landward side by the three-mile limit (Tr. 619). The area served lies mostly south of Louisiana, and though the eastern and western boundaries of the area are difficult to precisely fix from the record, the eastern boundary is east of the eastern most limit of Louisiana and the western boundary is below eastern Texas [OTC Exhibit A, Att. A(4)]. The points served in this offshore area are platforms used by oil companies and related firms for petroleum exploration and the drilling for and production of oil and gas in the Gulf. In February of 1975 there were 2,075 such platforms of which 387 were manned (OTC Exhibit 1-N, p. 2). By October 19, 1978 there had been an increase to 2,323 manned and 432 unmanned platforms (TS Exhibit 7, p. 3). About 10,000 persons were distributed among the manned platforms in 1975 (Tr. 608). There are from 20 to 150 persons on each manned platform (Tr. 607) and they usually work on a platform for a 7-day tour of duty and are then onshore for 7 days (Tr. 132, 195). Some people spend more time on the platforms; 1 witness spent from 200-240 days a year offshore (Tr. 179). The platforms are equipped with facilities for

meals and lodging; the company operating from the platform furnishes transportation to workers to and from the mainland by boat or helicopter (Tr. 185-188).

Need for Communications in the Gulf

8. Oil companies operating in the Gulf need reliable communications between offshore locations and their onshore offices. Typically, extensive reports of the previous day's activities and the plans for the current day are transmitted from a platform to an onshore business office during the 7 to 8 a.m. period (Tr. 133-134). High quality transmission is necessary (Tr. 138). Safety of the offshore populations also requires reliable communications. For example, a helicopter crash occurred near a platform and 11 people were seriously injured; their initial care was directed by an onshore doctor by telephone. A similar circumstance occurred when a doctor, linked by telephone from onshore to a platform, saved the life of a man who had suffered a massive hemorrhage. Immediate communication is easily accomplished with an onshore doctor through use of a communications system linked to onshore telephone companies (Tr. 167-168).

9. Placid Oil Company operates from over 30 platforms in the Gulf of which two-thirds are regularly manned (Tr. 132). It has studied the use of common carrier and private communications services and believes the former is preferable because the latter, to a large widespread company, would require too great a system (Tr. 143, 150).

10. Companies providing services to oil companies also need good communications with their onshore offices (Tr. 197). The ability of employees to communicate with their homes is important to them (Tr. 216, 222). The advent of a telephone system in the Gulf improved communications because other systems are less reliable, scratchy, and not as private (Tr. 216).

Communications other than OTC in the OTC Service Area

11. The exploration for and ultimate production of oil and gas in the Gulf preceded common carrier telephone service in that area. Because no common carrier service was available, the companies related to the oil and gas industry developed their own industrial radio systems and these still exist (OTC Exhibit A, p. 8; Tr. 133). They provide service in the Gulf and are connected to landline telephone companies for service to onshore locations.[2] The availability of this service to certain usages is disputed and will be subsequently addressed.

[2] The record with respect to these interconnections is scant; however the parties accept such an arrangement as fact (see OTC PFF para. 24; SCB/AT&T PFF para. 40; and TS Reply FF para. 3).

12. SCB and AT&T contend that the oil companies in the Gulf use various common carrier radio services (SCB/AT&T PFF para. B 43). There is little evidence of this in the record. It does appear that VHF maritime service is available in many locations and that "you can call anywhere" with it (Tr. 189).

13. The only telephone service is provided by OTC.

Telephone Service

14. No telephone service existed in the OTC service area before 1966 when OTC's predecessor, Gulf Coast Telephone Company (GCT), began construction of a telephone system pursuant to FCC license (OTC Exhibit A, Att. 2). Prior to that time, Southern Bell Telephone and Telegraph Company, predecessor to SCB, first in 1956-57 and then into the early 1960s, investigated the feasibility of a telephone system in the Gulf utilizing 58 bays of microwave, 50 pairs of undersea cable, and UHF radio to serve about 2,700 telephones. The study (as of 1962) projected an ultimate cost of $50,000,000 (OTC Exhibit CC, p. 3) and a monthly service charge of $18.50 per circuit mile (SCB/AT&T Exhibit 5, p. 21; Tr. 1408). The system was never built because of high costs, operation in international waters, lack of AT&T interest, and abnormal maintenance requirements because of the necessity for the use of aircraft and boats (OTC Exhibit CC, p. 9).

15. On February 23, 1966, an Order and Certificate[3] was adopted by the Commission finding that "the expanding exploration and production activities with respect to petroleum and gas wells in the Gulf of Mexico has resulted in the need of a reliable, high capacity off-shore communication service" and authorizing GCT to construct and operate a cable system for telephone, telegraph, and telemetry communications to fill that need. The Order and Certificate contemplated cables connecting offshore platforms to landline carriers. The Commission, in an Order and Certificate, released June 4, 1970,[4] indicated that GCT did construct and operate a backbone cable 350 miles long and associated radio facilities which provided "full message exchange telephone service and private line service between offshore oil platforms and artificial islands off the coast of Louisiana" which were connected "with the interstate toll system of the Bell Telephone company at Morgan City, Louisiana, and that the system cost more than 16 million dollars."

16. That order also indicated that GCT had been adjudged bankrupt on December 15, 1969 by a United States District Court, that a trustee in bankruptcy had been appointed, that the trustee had negotiated a contract with Core Laboratories, Inc. (Core) to purchase the assets of GCT and an

[3] *In the Matter of Gulf Coast Telephone*, 2 FCC 2d 614.

[4] Not officially reported.

associated company, and that Core had caused the formation of two corporations, Louisiana Offshore Telephone Company[5] and Data Com, Incorporated (Data Com) to accomplish this purpose. Core was the sole stockholder of Data Com and Data Com was the sole stockholder of OTC. Under the further terms of the order OTC acquired the GCT telephone system and the right to operate it. The OTC plant, as it now exists, consists of approximately 460 miles of armored submarine cable containing 120 wire and/or data channels.[6] Microwave has been used at various points in the system as has rural radio. The latter is being supplanted by Offshore Radio Telecommunications Service which is licensed under Part 21 of the Commission's Rules (OTC Exhibit A, pp. 3-6).

17. OTC's cable system has three land falls: Grand Isle, Rutherford Beach, and Salt Point, Louisiana (OTC Exhibit A, Att. A-4). At Grand Isle OTC's system interconnects with LaFourche Telephone Company (LaFourche) and at Rutherford Beach OTC interconnects with Cameron Telephone Company (Cameron) (OTC Exhibit A, Att. A-4; SCB/AT&T Exhibit 5, p. 24). Microwave furnishes the link between the cable landing at Salt Point and OTC's central operations building at Morgan City where SCB and OTC interconnect (OTC Exhibit A, p. 4 and Att. A-4; SCB/AT&T Exhibit 5, p. 25; Tr. 429, 593, and 673).

18. The interconnections with the LaFourche and Cameron exchanges are accomplished by facilities supplied by those companies (OTC Exhibit A, pp. 12-13 and Att. A-5, pp. 4-5; SCB/AT&T Exhibit 5, p. 25). The services provided in conjunction with those companies are foreign exchange (FX) and other private lines (OTC Exhibit A, pp. 12-13 and Att. A-5, p. 6; SCB/AT&T Exhibit 3, Att. 2; SCB/AT&T Exhibit 5, p. 24; Tr. 640). These services do not require an operator to complete connections (Tr. 641, 643).

19. The interconnection between OTC and SCB is more complex. FX and other private lines are connected through the OTC Morgan City central operations building to SCB's facilities in Morgan City (see SCB/AT&T Exhibit 5, p. 25, Att. 4). FX lines terminate in the foreign exchange central office (Tr. 1382). Private lines go beyond the SCB central office and to the customer's premises but are not connected to exchange switching facilities and thus have no access to the toll network (Tr. 1382-1383).

20. OTC offers measured rate telephone service only through its interconnection with SCB (Tr. 640-641). Measured rate telephone calls come into OTC's Morgan City facilities and are answered by OTC operators (OTC Exhibit A, p. 13; Tr. 602). The OTC operator notes

[5] The name of this corporation was subsequently changed to Offshore Telephone Company which is the complainant herein. It will continue to be referred to as OTC.

[6] This capacity is not used in many instances because it is not needed (Tr. 480-482, 566).

information for entry in OTC's log and then connects the caller to SCB's operator who also takes the information on the call and whether it is to be collect or charged to a third party or to a credit card (OTC Exhibit A, p. 13; Tr. 522, 602). The SCB operator then places the call (SCB/AT&T Exhibit 5, p. 27, Att. 5; Tr. 602). If the call is to Morgan City, the SCB operator still must complete the call (OTC Exhibit A, p. 13; SCB/AT&T Exhibit 5, p. 27; Tr. 522). Calls to the measured rate telephones from onshore are handled in reverse of this procedure (OTC Exhibit A, p. 13; Tr. 603).[7]

21. If the measured rate call is to Morgan City, there is no SCB toll charge (SCB/AT&T Exhibit 5, p. 27; Tr. 521-523) but SCB charges OTC 50 cents per call for the timing, ticketing, and billing it performs for OTC (Tr. 449, 521-522, 599). SCB does not charge the 50 cents fee for measured rate telephone calls beyond Morgan City; it collects the applicable toll charges (Tr. 522-523).

22. Basic exchange service is not offered by OTC. OTC's vice president in charge of engineering and marketing (Tr. 422) testified that OTC does not provide the equivalent of business or residential exchange service (Tr. 519-520). He is unaware of calling on OTC-provided facilities between different subscribers at locations in OTC's service area. Such a call would have to come onshore, be turned around on SCB facilities, and return offshore to the other OTC subscriber. Such a turnaround could occur on message service or FX service (Tr. 404, 448-449, 668). One OTC subscriber could speak to another if a private line service were taken between their locations (Tr. 606) and it is possible for one subscriber to communicate between various of its own locations by means of the equivalent of a private branch exchange (Tr. 442-446, 621).

23. OTC does not offer or provide the equivalent of Wide Area Telephone Service (WATS) (Tr. 520). The record does not indicate why this is true but OTC alleges that it does not offer the service because Bell has refused to permit OTC as an end-on-end carrier to do so (OTC Reply FF para. 73).

24. Message telephone service is provided by OTC under a basic rate of $4.50 for the first three minutes (OTC Exhibit B, p. 28). The measured rate charge applies in addition to the equipment charges (Tr. 595, 680-681). The designated measured rate telephones are similar to pay telephones where no subscriber pays an equipment charge (Tr. 661).

25. When OTC subscribers place any message call, they pay the message charge under OTC's tariff. If the call goes to the Morgan City, Louisiana calling area, no toll charge is applicable. If the call goes into the toll network, however, the caller pays in addition to the OTC message

[7] According to OTC, SCB has, since the hearing, provided OTC customers with direct dialing ability (OTC Reply FF para. 171).

charge, the Bell toll charge (Tr. 433, 521-523). This is what is known as an end-on-end rate.

26. OTC's Foreign Exchange Service involves the use of OTC facilities from the offshore location to the SCB Cameron or LaFourche facilities and FX lines of the latter companies to the foreign exchange. OTC bills its subscriber and then pays the connecting carrier (Tr. 432-433, 436, 606, 643).

27. OTC FX subscribers may place message toll calls on their FX lines. The FX line is connected to the toll network at the exchange in which the FX line terminates and the OTC subscriber pays the uniform toll rate for the portion of the call beyond those exchanges in addition to the OTC charges for the FX service (Tr. 433-434, 436, 525, 641).

28. Subscribers to private line services of OTC pay OTC's charges for its link and the applicable charges for the connecting carrier provided line (SCB/AT&T Exhibit 5, p. 25).

29. Workers on platforms using OTC services may use OTC measured rate telephones in which case they pay the OTC measured rate charge for calls to Morgan City, Louisiana, plus a Bell toll charge if the call goes beyond Morgan City, Louisiana. These calls are paid by the use of the caller's credit card, or are billed to a third party, or are collect calls (Tr. 515). Workers also place calls to points onshore bay using OTC services subscribed to by their employers. In such cases, where the call is placed to a point beyond the exchange in which the employer's line terminates, the worker pays only the toll charge for the portion of the call beyond that termination point and no part of the employer's OTC service charge (Tr. 139, 217-218).

OTC Revenues, Expenses, and Investment

30. As of January 5, 1970 OTC provided approximately 57 FX services, 37 Private Line Services, and 27 Measured Rate or Message Toll Telephones (SCB/AT&T Exhibit 3, Att. 2). The record does not indicate traffic with respect to FX or private line services but in March and April 1978 329 measured rate calls originated or terminated at points in Morgan City and 7,900 calls originated or terminated at points beyond Morgan City (TS Exhibit 15, pp. 4-5, 40-41).

31. OTC filed revised schedules of its Form M for the years 1974-1977 dated September 25, 1978. The revised schedules reported dollar revenues as follows (TS Exhibit 5):

TYPE REVENUE	*1974*	*1975*	*1976*	*1977*
Local Service Revenue: Subscriber Station	–	–	–	–
Message toll telephone	$ 476,618	$ 433,938	$ 529,288	$ 712,240
Private line toll telephone	564,662	499,668	530,905	599,458
Rent revenue	4,000	3,900	20,250	18,600
Other operating revenue	20,125	296,781	203,218	209,395
Total Operating Revenue	$1,065,406	$1,234,288	$1,283,661	$1,539,694

While the Trial Staff and SCB/AT&T question the classification of various types of service as between local service and interstate message toll these amounts are some indication of the magnitude of OTC revenues including toll revenue.

32. SCB/AT&T has developed a table (Exhibit 5, Att. 8, p. 1) comparing OTC's investment, expenses, and taxes with those of other USITA reporting companies.

		USITA Reporting Companies			
Dollars per Total Telephone in 1977	*Highest Company*	*Next Highest Company*	*Lowest Company*	*Average*	*Offshore Telephone Company*
Telephone Plant in Service	8,331	2,660	281	817	120,826
Maintenance Expense	312	188	2	46	11,909
Depreciation and Amort. Expense	551	188	10	43	2,960
Total Expenses and Taxes	1,558	515	61	189	17,912

The Trial Staff is of the view that the information concerning OTC in the above table is erroneous because of improper accounting by that company and that telephone plant in service per OTC main station should be $153,112 while its operating expense per main station should be $11,431 (TS PFF paras. E27, E28). For reasons stated in the conclusions, no attempt will be made to make a finding as to the proper values. Evidence of record indicates that the cost per telephone 107 bush communities in Alaska was more than $30,997.21 in 1978; the Alaska average is $2,324 (OTC Exhibit BB).

33. In 1978 there were 2,323 platforms in the Gulf of which 432 were manned (TS Exhibit 7, p. 3).[8] At some locations there are clusters of up to four connected platforms (TS Exhibit 8, pp. 7-8). It is not clear whether the 1978 totals refer to individual platforms or platform clusters where they occur. In any event, OTC serves about 100 locations in the Gulf (OTC Exhibit A-3).[9] Whether some of these locations involve separate services to the above platforms or clusters of platforms does not appear. There is service to some unmanned platforms (Tr. 623). An OTC witness said OTC serves about 2,400 of the approximately 10,000 people who inhabit the offshore platforms (Tr. 612-613).

Uniform Interstate Rates

34. AT&T has favored the concept of universal service. In a speech given in 1967 the then chairman of the board of AT&T stated that the industry had averaged costs in setting rates so that "remoter and harder-to-serve communities and customers" might enjoy communications development (OTC Exhibit U, p. 16).

35. OTC expert witness Asher H. Ende testified that since 1936 the Commission has tried to eliminate non-uniform interstate rates and that that goal was mentioned in reports to Congress filed by the Commission over the years beginning in 1937. He said that by 1948 the Commission had reduced to 320 routes on which other line (or end-on-end) charges apply as against 393 such routes a year earlier. In 1951 only 17 such routes remained (OTC Exhibit B, pp. 9-13) and according to Mr. Ende, the only other line service now existing in the contiguous United States is that of OTC (OTC Exhibit B, p. 5). He said further that the uniform rate schedules now apply between the mainland and offshore islands in both oceans and the Florida Keys (OTC Exhibit B, p. 13).

Toll Sharing and Division of Revenues

36. Until 1913 there was no interconnection between the Bell system and the independents. During that year it was agreed that Bell would provide long distance carriage to the independents and that the billing would be on an end-on-end basis [OTC Exhibit X(2), p. 18]. Through service continued on various tariff bases until the present system for setting schedules on a prorated cost basis was begun [OTC Exhibit X(2), p. 21]. A through rate arrangement has existed through several plans and continues to exist under the "Ozark Plan" adopted in 1970 [OTC Exhibit X(2), pp. 22-27]. This plan brought the independents into the interstate toll

[8] Manned platforms are those on which people are always present; all platforms are visited at least occasionally (Tr. 620).

[9] The 60 red dots on the exhibit refer to fixed locations; the 36 green dots to temporary fixed locations (Tr. 473).

pool[10] on an equal basis with AT&T as to traffic generated and received by the independents and OTC now is the only telephone company in the United States including Alaska, Puerto Rico, the Virgin Islands, and Hawaii which is not a member of the nationwide interstate toll pool (Tr. 1270). There are no published standards regarding inclusion or exclusion of a telephone company (OTC Exhibit T).

37. Toll settlements are the vehicle for providing uniform through rates for long distance telephone services in the United States. They are intended to compensate the independent telephone company, which jointly provides toll service with Bell, for its expenses of providing toll service and for a fair return on its plant used to do so (SCB/AT&T Exhibit 5, pp. 13-14). There are both intrastate and interstate toll settlement procedures. The procedure for determining which costs and revenues are interstate and which are intrastate toll-associated is called separations [OTC Exhibit X(1), pp. 136-140].

38. All revenues from jointly provided interstate toll service are apportioned in some manner between the carriers providing that service but not all services are covered by toll sharing or toll settlement procedures. Some jointly provided services are at end-on-end or this line-other line rates, and are excluded from toll settlements. The services included in toll settlements between Bell and independent telephone companies are message toll telephone service (MTS), Wide Area Telecommunications Service (WATS), and private line toll services. These interstate services are provided under a schedule of rates filed by AT&T which is uniform throughout the conterminous United States (SCB/AT&T Exhibit 5, pp. 14-15).

39. Schedule I of AT&T Tariff 263 is the tariff under which interstate MTS are provided in the conterminous United States. These rate schedules are developed upon the basis of nationwide average costs and the rates for service provided thereunder are uniform in nature, i.e., the same rate applies to calls between stations which are separated by the same distance regardless of the geographical locations of the particular stations. The rates vary by distance, by time period, by time of day and whether the call is person-to-person, dial station-to-station, or operator assisted station-to-station (SCB/AT&T Exhibit 3, pp. 4-7).

40. Rates and division of revenue procedures for message telecommunications between the United States and foreign countries vary. Message service between the United States and Canada is provided under Schedule II of Tariff 263. It is similar in structure to the domestic schedules in that charges vary for distance, time period, and class of service; rates are through and uniform. However, revenues between the two countries are divided upon the basis of a ratio of the costs of the two countries in

[10] The pool is the fund created by the payment of through charges for toll calls.

providing message service. Service to remote exchanges in Canada is provided on an end-on-end basis (SCB/AT&T Exhibit 3, p. 8; Tr. 1360-1363) as is message service between the United States and Mexico (SCB/AT&T Exhibit 3, p. 9). Rate schedules for message service between the United States and overseas countries vary in the classes of service available, the presence of distance related charges, rate schedules, and time of day aspect of charges. Revenues from overseas message services are generally divided between the two countries involved upon a 50-50 basis (SCB/AT&T Exhibit 3, pp. 9-11). Private line service between the United States and other countries is always provided on an end-on-end basis. Each country keeps the total revenue for service provided under its own tariffs (SCB/AT&T Exhibit 3, p. 19).

41. Toll settlement procedures applicable to domestic interstate toll services involve the following: the Bell system operating companies report their interstate toll revenues billed and collected to an interstate Bell Division of Revenues pool. Also reported are expenses, taxes, and investment allocated to interstate operations. Each operating company is reimbursed from the pool for its interstate expenses, taxes, settlements, and return on interstate toll net plant investment. Independent telephone companies, with whom the Bell system companies jointly provide service at through and uniform rates, receive essentially the same treatment through an individual company cost study or through an averaging method. The toll settlements are netted against toll revenues to determine the cash flow between the independent and the pool (SCB/AT&T Exhibit 5, pp. 6-12).

42. Costs and revenues associated with exchange services are excluded from domestic toll settlements (SCB/AT&T Exhibit 5, pp. 16-17). By definition, exchange service and toll service are mutually exclusive.[11] FX service is composed of an exchange portion and an intercity portion provided under a toll private line tariff. The exchange portion of the service is excluded from, and the toll private line portion is included in, toll settlements. The toll private line link of FX service provided between two cities in one state is included in intrastate settlements; the toll private line link of FX service between two cities in different states is included in interstate settlements. Where FX type service is provided within a city, it is provided under the general exchange tariff, and is excluded from toll settlements (Tr. 1496-1498). Extended Area Service (EAS) enables all

[11] Exchange service "means service within a telephone exchange or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange and which is covered by the exchange service charge" 47 U.S.C. 3(r). Telephone toll service is "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service" 47 U.S.C 3(s).

basic exchange subscribers of an exchange to call any other exchange in the EAS complex without paying a toll charge and EAS service is excluded from toll settlements (Tr. 1498-1501).

43. The various mobile radiotelephone services are provided at end-on-end rates and are excluded from toll settlements. These services are the Aviation Radiotelephone Service, the Domestic Public Land Mobile Radiotelephone Service, and the Maritime Mobile Radiotelephone Service (SCB/AT&T Exhibit 5, pp. 17-19).

44. One of the three Maritime Mobile Radiotelephone Services, however, the High Seas Service, is provided at a through rate, and a form of division of revenues for such service takes place (SCB/AT&T Exhibit 3, p. 16; Tr. 1098). The through rate is not the nationwide average rate of the AT&T Schedule I, but the sum of a flat charge of $13.50 for the High Seas radio link and $1.50 for the land toll link. The carrier providing the radio link keeps the $13.50 charge and the land carrier retains the $1.50 charge (Tr. 1486-1488).

45. Also excluded from toll settlements are the costs and revenues attributable to special construction for unusual customer installations (SCB/AT&T Exhibit 3, pp. 20-22; SCB/AT&T Exhibit 5, pp. 19-20). OTC also makes these charges and they have been applied to all OTC customer installations (Tr. 679).

OTC Position on the Effect of Schedule I Through Rates on OTC

46. In Support of its view of the public interest, OTC presented Mr. Ende as an expert on the development of the present system of uniform rates for interstate message toll service. Mr. Ende noted that uniform through rates throughout the United States has been a goal of the Bell system from its earliest days and that Bell "has uniformly favored maintenance of the MTS network as a unified single nationwide system responsive to public need and providing service to all at uniform rates" (OTC Exhibit B, pp. 18-19).

47. He is of the opinion that the Bell position with respect to OTC is inconsistent with all prior expressions of Federal and Bell philosophy. He has found nothing about OTC which would distinguish it from any other MTS carrier which is a party to the nationwide system. He said that the solution of energy source problems is the "single most important problem facing the nation" and that it is consistent with national policy to contribute to that solution (OTC Exhibit B, pp. 18-21).

48. Mr. Ende said that an employee working offshore pays a minimum of $4.50 for a three-minute call and that such a call can exceed $8; these costs have an inhibiting effect on the use of the OTC system when compared to the nationwide uniform through one-minute DDD rates which begin at 19¢ per minute for daytime calls (OTC Exhibit B, p. 22). Mr.

Ende compared the charges which the OTC caller pays with that of the current uniform nationwide rate pattern. He stated:

> [A]ny person within the United States placing an interstate call via any other landline carrier [other than Offshore] may elect to place a direct dial call [DDD] where the range of charges is from 23¢ for the second zone to 54¢ per minute for the furthest zone. If such person were to talk for three minutes, his cost would be 47¢ for the second zone and $1.30 for the furthest zone. . . . An Offshore customer making similar calls over similar distances would pay somewhere between seven and 13 times as much for the Offshore three minute conversation as he would for a direct dial day time call made via any other [telephone] facility (OTC Exhibit B, p. 28).

He said that the extension to OTC of Schedule I through rates would produce a 70 to 90 percent rate reduction and have a tremendous stimulating effect on the utilization of the system (OTC Exhibit B, pp. 31-36). He noted that the FCC in its Twenty-Ninth Annual Report to the Congress for Fiscal Year 1963 reviewing the effect of the "after-9"[12] rates imposed by Bell stated that while Bell had initially estimated there would be a $30 million savings to users, the actual effect, because of the increased traffic, was in the nature of $79 million (OTC Exhibit B, p. 35).

49. He further stated:

> While its operations to and from platforms differ from the usual wire line operators, it is not unique. Companies serving points like Catalina Island, Key West and the homes on the bottom of the Grand Canyon also differ from the average wire line company, but are included in the uniform rate system.
>
> The single distinguishing factor for Offshore is that it is engaged in providing the business needs of an industry vital to the national interest and the social needs of its employees who work in hazardous surroundings separated from home for extended periods of time. If Offshore's customers are to be singled out for special treatment, precedent dictates that it should be favorable special treatment not such highly unfavorable treatment (OTC Exhibit B, pp. 23-24).

50. OTC is of the belief that, considering the location of drilling activity in the Gulf and OTC's present system, it would take only a small investment to increase by a factor of four the volume now handled. This would be accomplished by the use of cable, microwave, or UHF radio (OTC Exhibit B, pp. 76-77; Tr. 474-475).

51. It is OTC's further contention that the burden on the toll pool by the inclusion of OTC would amount only to the addition of about $2,400,000 to a pool which in 1977 amounted to about $11,400,000,000 so that, OTC believes, the OTC burden would amount to only about .02 percent of the total interstate revenue [OTC Exhibit FF(4)]. Some independents who participate in the pool now receive more in interstate message toll settlement revenue than their billings for interstate message toll charges (OTC Exhibit V). Another inclusion in the pool which produces a net deficiency is noncommercial radio and television program transmission. The pool also bears the burden of other services which, when

[12] Anywhere in the U.S. for $1 for three minutes after 9 p.m.

segregated, do not return Bell's authorized rate of return of 9.6 percent. A list of these may be found at OTC Exhibit S, pages 11, 12, and 13. The interstate pool carries a burden of 11¢ per interstate call which is in effect a subsidy of local exchanges (Tr. 357-360).

52. Curtis Bushnell, another OTC expert, testified that in every year since it began operating, OTC has had a net operating loss which ranged from $610,037 the first year of operation to $1,127,191 the fifth year, to $458,267 in 1977 for a total of $5,609,393. He provided a table demonstrating that if OTC had received settlements under the contracts that most independents have with Bell, OTC would have received in 1977 a net settlement of $2,764,307 (OTC Exhibit C, p. 13, Att. 5). Mr. Bushnell is of the opinion that within three years after the inception of through rates the number of telephones in message telephone service would increase from the present 100 to 750 and the number of private line systems with an OTC would increase from 50 to 200. Based on these projections, he feels that the total contribution to the pool by OTC would be less than $1 million at the inception of the new rates but would increase to $4 million to $6 million in three years. These "broad approximations" are based on general regulatory experience and the fact that there are few telephones in the Gulf as compared to the mainland (OTC Exhibit C, Att. 6; Tr. 789-792, 837-838).

Conclusions

53. Two matters are noted. The first is that the commission designated no issue with respect to the need for a telephone system in the Gulf. This, presumably, is because determination of that need was made in the Commission's February 23, 1966 Order and Certificate (para. 15, *supra*). It is also noted that while the designation order directs charges to be fixed if a conclusion is reached that through charges are appropriate, there is no evidence in the record respecting the reasonableness of, necessity for, or public interest in, any through charges other than those in Schedule I of AT&T Tariff 263. OTC's case is presented on the theory that since Bell and FCC policy make Schedule I charges available to almost all of the telephone companies in the United States, they should be extended to OTC.

54. The evidence establishes beyond reasonable question that Commission and Bell policy for many years has been to promote the availability of long distance telephone service by providing relatively low cost toll telephone service at uniform charges throughout the country (paras. 34-35, *supra*). Uniform charges in this context means that the same rate per mile will be charged for any call at the same time of day at the same level of service regardless of which two points in the country are being connected. This policy has been implemented by Schedule I of AT&T Tariff 263. Other charges are provided by the various carriers for more

specialized service. These include service to ships on the high seas, to various other mobile stations, and to calls that must be completed through connections with carriers in other countries (paras. 40, 43-46, *supra*).

55. While it is possible to distinguish OTC's service territory from those of other domestic carriers because its customers are all without the three-mile limit and the jurisdiction of any state, that distinction is of little practical substance. OTC is subject to regulation by the Commission and is domestic in most attributes except for its location beyond state boundaries; the Commission has found the platforms to be domestic in character in another context.[13]

56. Another distinction urged by the Trial Staff and by SCB/AT&T, is that OTC provides no basic exchange service. The reason for pointing this out is twofold–it serves to distinguish OTC from other domestic telephone companies and it has cost ramifications because Schedule I charges are fixed and the interstate pool is divided so that local service is subsidized to carry out Commission and Bell policy to provide inexpensive basic exchange service. The distinction is not relied upon here though it might very well have been if the question presented by this case had been a closer one.

57. The overriding consideration as to whether or not OTC should have through charges is costs. Using information in the record most favorable to OTC, it appears that OTC's 1977 average investment per main station was $120,826, while the highest average investment for any other independent company included in the pool was $8,331, and the overall USITA average was $817. OTC's annual average expense (including taxes) per main station was $11,431 in 1977, compared to the highest average for any other independent of $1,558, and an overall USITA average of $189 (para. 32, *supra*).

58. OTC recognizes this cost problem and addresses it in two ways. The first is that since its burden on the pool as compared with the size of the pool is small, its participation is justified (para. 51, *supra*). That argument would condone any unreasonable cost so long as it is not large enough to threaten the system. The other approach is an attempt to show that a reduction in charges to Schedule I levels would stimulate demand and revenues to the extent that OTC would not be a burden on the interstate pool (para. 51, *supra*). Competent convincing evidence that Schedule I through charges would stimulate demand to the point that OTC's operation would not be a substantial burden might well obviate objection to its participation in the pool because of its costs.

59. OTC, which has the burden of proof in this proceeding, has failed to make its case relative to demand stimulation. While Mr. Ende and Mr. Bushnell were both optimistic with respect to the effect of reduced

[13] *Cities Service Oil Co., et al.*, 51 FCC 2d 653, 660 (1975).

charges on usage of the OTC system, projections offered by them were based on their wide experience and very little else. Mr. Ende said that his optimism was due to a reflection on the usage stimulation that occurred when the Bell system drastically reduced rates for after 9 p.m. long distance calling (para. 48, *supra*). But neither Mr. Ende nor any other OTC witness attempted to draw a factual parallel between the Bell reduction and the OTC situation. It is not apparent without the benefit of some explanation, how a rate reduction for non-business hour usage of a system already in place compares with a situation where substantial additional usage requires the connection of many new customers with existing communications systems, particularly when installation charges are always levied (para. 45, *supra*). Absent an explanation, there is no apparent parallel except the general one that when prices go down usage goes up.

60. Mr. Bushnell, who projected an eventual positive contribution to the pool by OTC because of added demand due to reduced rates (para. 52, *supra*), has no apparent basis for this view except his wide experience as a regulator and the fact that there are now only comparatively few OTC customers. This is not enough. Expert opinions, to be of probative value; must have some more tangible basis (see *McCormick on Evidence,* 2nd ed., p. 31 *et seq.*).

61. While the foregoing require that the OTC projections be disregarded, it is worthwhile to pursue Mr. Ende's estimates. He was of the opinion that Schedule I through charges would reduce the costs to OTC customers of MTS calls by 70 to 90 percent (para. 48, *supra*). If this is true and the number of calls remained constant, revenues would decrease by 70 to 90 percent. To maintain the present level of revenues from long distance service, OTC's volume would be required to increase 3⅓ to 10 times with no increase in investment. But the present plant can handle only four times the present volume (para. 50, *supra*) and additional plant costs would be necessary. Thus a greater than 3⅓ to 10 times increase in volume would be needed to keep revenues where they now are, let alone at a level which would lessen the burden of OTC on the pool.

62. The voluminous criticism by the Trial Staff and SCB/AT&T of OTC's accounting disregarded because the results of those differences, while reasonably large in dollar amounts, are not large enough to make a real difference. Under OTC's view it has suffered losses in each year (para. 52, *supra*); the Trial Staff doubts any loss (TS PFF para. E10). OTC's books show an investment per main station in 1977 of $120,826; the Trial Staff calculates this as $153,112. The books show an annual expense per main station of $17,912; the Trial Staff calculates this to be $11,431 (para. 32, *supra*). The conclusions herein reached remain the same no matter which loss, cost, and expense dollar amounts are used and there is

no reason to conclude which showing is correct. A finding that there is a necessity for a public interest in through charges could entail a review of OTC's accounting practices and any which violated the Uniform System of Accounts could be brought into conformity. Proper accounting would also obviate any problems caused by the relationship between OTC and its parent company, criticized by both the Trial Staff and SCB/AT&T (TS PFF para. F13; SCB/AT&T PFF para. 161). Nor is there a need to discuss the past refusal of SCB to afford to OTC and its customers the practical and financial benefits of direct distance dialing. This option was apparently unreasonably denied OTC customers in the past by SCB but that situation is, according to OTC, ancient history (OTC Reply FF para. 171).

63. Notice must be taken of the claims of OTC and SCB/AT&T relative to the availability of existing private communications systems in the Gulf for personal calls. These private systems are interconnected with Bell so that an offshore caller may communicate with any point in the long distance system (para. 11, *supra*). It is OTC's position that FCC regulations governing Industrial Radio Service and Private Operational Fixed Microwave Service preclude use of these services for non-business communications (OTC PFF para. 160; OTC Reply FF Att. A1, A2, A3). The Rules cited by OTC are Sections 90.65, 90.73, 90.75, 94.5, and 94.9(a)(1). Section 90.65 provides that persons eligible to hold authorization in the Petroleum Radio Service may "operate radio stations for transmissions of communications essential to the petroleum related activities of the licensee." Section 90.73 includes a similar provision relative to operators of radios licensed in the Industrial Radio Service and Section 90.75 contains a similar provision but related to radios licensed in the Business Radio Service. Section 94.5 extends the usages set forth in the Part 90 provisions to operators in the Private Operational Fixed Microwave Service. Section 94.9(a)(1) limits the microwave operator to, with certain irrelevant exceptions, transmission of its own communications.

64. SCB/AT&T takes the position that Section 90.405(b) permits communications for the maintenance of the morale of offshore workers (SCB/AT&T PFF para. 42). The Section states, as pertinent here:

> Stations licensed under this part may transmit only the following types of communication:
>
> * * * * *
>
> (b) Communications directly related and necessary to those activities which make the licensee eligible for the station license . . . .

If these services may be used for any casual conversation which is related to morale-building, it was superfluous for the Commission to have restricted usage at all except to the extent necessary to keep the license from being a common carrier. Private systems are not legitimately available for morale-building conversations [except in emergency situa-

tions provided for by Section 90.405(a)].[14]

65. OTC and SCB/AT&T have each developed sets of characteristics of common carriers which, each argues, should govern whether a given carrier should be included among those having Schedule I through charges (OTC PFF para. 44 *et seq.*; SCB/AT&T PFF para. 120 *et seq.*). If OTC and SCB/AT&T are suggesting that there be developed on the record in this case a set of general criteria governing the inclusion of carriers in the pool, such suggestion is rejected. The rather narrow record developed here does not lend itself to broad generalizations. Cost was of concern to the Commission (Designation Order, para. 3) and is the crucial factor in reaching the conclusions herein. The existence of other services financed at a loss by the pool as pointed out by OTC (para. 51, *supra*) is also, on the record here, irrelevant for a number of reasons. Two of those are that the magnitude of those losses is not shown and there is no evidence as to the public benefit of any of those services.

66. It is concluded that the evidence presented in this matter does not permit findings that prescription of Schedule I through charges are either reasonable, necessary or in the public interest and that no evidence as to any other through charge has been presented.

67. The issues designated by the Commission are resolved as follows:

(a) OTC's requests for the establishment of through charges are not reasonable;

(b) it is neither necessary nor desirable in the public interest to establish through charges and the division of such charges; and

(c) no charges and divisions should be established.

Accordingly, IT IS ORDERED that unless an appeal is taken to the Commission from this Initial Decision by any of the parties or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules,[15] that part of the above-captioned petition of Offshore Telephone Company designated to be heard in the Memorandum Opinion and Order of the Commission released September 23, 1977 (FCC 77-628) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

FREDERIC J. COUFAL *Administrative Law Judge*

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[14] There is a related question as to whether existing Bell tariffs provided for such interconnections before 1979 (OTC Reply FF para. 10; SCB/AT&T PFF para. 42). The connections did exist; if they were unauthorized, that fact may relate to any damage claimed by OTC but not to whether through rates should now be prescribed.

[15] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) of the Rules.

Educational Noncommercial TV Station, Limitations Subscription TV

Report and Order terminated proceeding concerning use of subscription television authorization for public television stations with no change in the rules.
—*Public Television STV*
BC Docket No. 82-441

FCC 84-112

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	
Amendment of Part 73.642(a) of the Commission's Rules Concerning Subscription Television Authorization for Noncommercial Educational Television Station Licensees	BC Docket No. 82-441

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 29, 1984 Released: April 17, 1984

BY THE COMMISSION:

1. In this *Report and Order,* we are terminating this proceeding which proposed to amend the rules to permit public television stations to engage in subscription television (STV) operations.[1] Upon review of the record developed in this proceeding, we have determined that no change in our rules is warranted. However, we will consider permitting individual public television station licensees to engage in STV operations on a waiver basis.

Background

2. Public television stations are currently barred by the Commission's rules from providing their service on an STV basis. In the past, public television station licensees have petitioned the Commission for permission

[1] The term "public television" is used herein to refer to all stations licensed by the Commission as noncommercial educational television stations. Subscription television involves the transmission of a scrambled television signal which, on payment of a fee, subscribers are authorized to unscramble through use of a decoder.

to broadcast in an STV mode.[2] In requesting STV authority, the petitioners stated that STV operations could be used to earn revenues to support their public broadcasting services. We also note that the Temporary Commission on Alternative Financing for Public Telecommunications (TCAF) determined that "STV may prove an effective way to generate income without interfering with current services."[3] The TCAF, accordingly, recommended that the Commission initiate a rulemaking to develop appropriate policies for authorizing STV operations by public broadcast stations.

3. Consequently, on July 15, 1982, the Commission adopted a *Notice of Proposed Rule Making (Notice)* to consider permitting STV operations by public television stations.[4] The *Notice* explores the possibility of authorizing STV for public television stations as a vehicle to foster public broadcasting operations. Twenty comments and nine reply comments were submitted by twenty-four parties in response to the *Notice*.[5] Some commenters support STV authorization for public television stations. The National Telecommunications and Information Administration and many public broadcast stations recommend that the Commission authorize STV for public television without any restrictions. The National Association of Public Television Stations recommend that the Commission authorize STV without any restrictions except that full-time STV be prohibited in those markets where there is only one public television station. The Corporation for Public Broadcasting and the National Association of Broadcasters express concerns that a "pay" public telecommunications service may, under certain circumstances, violate the Communications Act and be inconsistent with public broadcast policy. However, they support STV authorization for public television stations on a case-by-case basis. A list of parties filing comments is contained in Appendix A.

Discussion

4. After reviewing the record, we believe that no change in our rules is warranted. We believe this is the case for two reasons: (1) statutory concerns about general unrestricted STV authority for public television;

[2] Applications of KQED, Inc., for Subscription Television Authorization and for Waiver of the Rules filed April 1980; Black Television Workshop Application for Channel 22, Cotati, California, File #BPET 810903KF, filed September 3, 1981; Petition for Waiver to Authorize Lake Central School Corp. to Broadcast Subscription Television filed November 9, 1981.

[3] *Alternative Financing Options for Public Broadcasting*, TCAF Report, Vol. I, p. 69 (July, 1982). The TCAF was created by the Public Broadcasting Amendments Act of 1981, Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, 97th Cong., 1st Session.

[4] *See Notice of Proposed Rule Making*, BC Docket No. 82-441, 47 FR 36252, August 19, 1982.

[5] Several parties filed motions to accept late comments. In light of their significance, we have decided to accept these comments as part of the record in this proceeding.

and (2) our general policy concern about a wholesale changeover of the public television system. Our reasoning is explained below.

5. *Authority for permitting STV.* In the *Notice,* the Commission requested comments regarding whether Section 399B of the Communications Act of 1934, as amended (Communications Act), precluded or imposed any limitations on STV operations for public television stations.[6] While most parties agreed that Section 399B is broad enough to encompass STV, many parties stated that unrestricted STV by public television stations would be inconsistent with this section of the Communications Act. The parties disagreed, however, regarding exactly how to apply Section 399B's dictate that remunerative activities of public broadcast stations shall not interefere with the provision of public telecommunications services. Further, the commenters disagreed in what manner the Commission should limit STV operations by public television stations.

6. We note that the legislative history associated with Section 399B states that " . . . this 'non-interference' test is broad, and *is to be judged as the circumstances in each particular instance dictate. . . .* "[7] (Emphasis Added) The Commission clearly has the authority in particular instances and under certain circumstances to permit STV operation by public television. However, there is no clear guidance in the record of this proceeding or in the legislative history of Section 399B regarding how general authority for public broadcasters to engage in STV operations can be promulgated consistent with our statutory responsibilities under Section 399B. For this reason, we conclude that a case-by-case waiver approach is more consistent with Section 399B than a general rule change at this time.

7. *Public television as an STV service.* Many parties stated that there are benefits to be derived from using STV as a supplementary fund-raising device but that these benefits are diminished by changing the system to one which could be dominated by STV. The Commission is sympathetic to the concerns raised by these parties regarding the public detriments that might inhere from permitting the public television broadcasting service to make such a switch over to an STV service. We, therefore, believe it would be inappropriate for the Commission to grant a general STV authorization for public television station licensees.

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[6] Section 399B authorizes public broadcast stations "to engage in the offering of services, facilities, or products in exchange for remuneration" but constrains such activities by adding the caveat that: "any such offering by a public broadcast station shall not interfere with provision of public telecommunications services by such station."

[7] H.R. Rep. No. 97-82, 97th Cong., 1st Sess. (1981) at 17.

Conclusion

8. For the reasons explained above, we have determined that no change in our rules is warranted at this time. A number of requests for permission to engage in STV operations were filed by public broadcast interests prior to the adoption of the *Notice*.[8] In view of our finding with regard to general STV authority for public broadcast stations and the uncertainty as to the continued interest of those requesting waivers, we have decided to dismiss without prejudice their requests in the context of this proceeding. The Commission is, of course, always willing to entertain requests for waiver of its rules. Public television licensees wishing to apply for such waivers should submit information regarding how their service will be consistent with their duties and responsibilities as public television licensees.

9. Authority for this action is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

10. IT IS ORDERED that the petitions filed by KQED, Inc., and Lake Central School Corp., ARE DISMISSED without prejudice.

11. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

*Appendix A-may be seen in the FCC Dockets Branch, 1919 M Street, N. W. Washington, D. C.

[8] See footnote 2, *supra*.

Distress Sale
Distress Sale Policy

Commonly-owned renewal applicants' motion for distress sale relief granted. Transfer of applicants' stations for price representing less than 75% of their fair market value approved although the stations' renewal applications had been designated for hearing on basic qualifying issues, complied with formal requirements relating to ascertainment of market value and disclosure of circumstances underlying distress sale proposal.
—*Radio Station WTJH*
MM Docket No. 83-47

Del. Auth. 84-01

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
James S. Rivers and the Fulton National Bank as Trustees for Ronald Rivers, Tolliver R. Rivers and Patricia M. Rivers, Executrix of the estate of Herschel Rivers d/b/a Radio Station WTJH (WTJH) East Pont, Georgia	MM Docket No. 83-47 File No. BR-811106UA
James S. Rivers, Inc. (WJIZ(FM)) Albany, Georgia	MM Docket No. 83-48 File No. BRH-811106UE
Southeastern Broadcasting System, Inc. (WMJM and WFAV(FM)) Cordele, Georgia	MM Docket No. 83-49 File Nos. BR-811106UB and BRH-811106UD
For Renewal of License	

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 1984 Released: May 24, 1984

BY THE CHIEF, MASS MEDIA BUREAU

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority,[1] has before it: (1) a Motion for Relief by Distress Sale filed October 4, 1983, by the above-captioned licensees (hereinafter referred to as "Rivers") which requests authority to assign the captioned licenses to Silver Star Communications–Albany, Inc. (Silver Star) pursuant to the Commission's distress sale policy;[2] concurrently-filed applications to assign those licenses to Silver Star;[3] (3) supplements to Rivers' foregoing Motion for Relief by Distress Sale filed on the following dates: October 31, 1983; November 7, 1983; November 9, 1983; November 15, 1983; February 6, 1984 and February 10, 1984; and (4) representations made concerning Rivers' proposed distress sale at the prehearing conferences held on October 6 and 13, 1983 (Tr. 50-106).

2. By *Memorandum Opinion and Order*, 48 Fed. Reg. 8585, published March 1, 1983, the Commission designated the license renewal applications of the above commonly-owned radio stations for a consolidated hearing to determine whether Rivers possesses the requisite character qualifications to remain a licensee of the Commission. Following submission of Rivers' instant motion for relief by distress sale, the presiding Administrative Law Judge suspended all procedural dates, including the hearing commencement date. *Order*, FCC 83M-3833, released October 25, 1983, and *Order*, FCC 83M-4396, released November 29, 1983.

3. In the instant motion, Rivers requests that the Commission grant the renewal applications for Stations WTJH, WJIZ, WMJM and WFAV conditioned upon the assignment of those stations to Silver Star in accordance with the Commission's distress sale policy. Rivers proposes to sell the stations to Silver Star for an aggregate price of $2,085,000[4] to be paid as follows: $400,000 to Southeastern Broadcasting System, Inc. for WMJM and WFAV; $1,086,250 to James S. Rivers, Inc. for WJIZ; and

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[1] *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849, 859 at para. 19 (1982); *Faith Center, Inc.*, FCC 83-448, released September 30, 1983, at footnote 11.

[2] *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978) and *Clarification of Distress Sale Policy*, FCC 78-75, 44 RR 2d 479 (1978); *Grayson Enterprises, Inc.*, 77 FCC 2d 156 (1980). In order to increase minority ownership in the broadcast industry, the Commission's distress sale policy permits licensees, whose renewal applications have been designated for hearing on basic qualification issues, to transfer to assign their licenses, at no more than seventy-five percent of fair market value, to applicants with a significant minority ownership interest.

[3] The assignment applications (File Nos. BAL-831004GS, BAL-831004GT, BALH-831004GU, BALH-831004GV) were filed on October 4, 1983. They were subsequently amended on April 13 and 29, 1984, to rectify certain dificiencies pointed out by the Bureau.

[4] The $2,087,000 aggregate price specified in the sales agreement includes an obvious $2,000 mathematical error in the addition of the agreement's separate sale prices for each of the stations. Thus, the actual sale price should be $2,085,000.

$598,750 to Radio Station WTJH for WTJH.[5] In addition, James S. Rivers, a principal of the licensees has agreed to lease the land and buildings used by the stations to Silver Star. The lease for WJIZ covers a six-month period at a monthly rental of $750. The other two leases extend for fifteen years at monthly rentals of $1,556 for WTJH and $1,000 for WMJM and WFAV.

4. In support of its claim that $2,085,000 constitutes a distress sale price, Rivers submitted three professional appraisals of the fair market value of each station as of the date on which the renewal applications were designated for hearing. Each of the appraisals takes into account the fact that Silver Star will lease rather than purchase the land and buildings. One appraisal was performed by an appraiser retained by the sellers. Another was by an appraiser retained by the buyer. The third appraisal was performed by an appraiser who was jointly retained by Rivers and Silver Star. The fair market values for the four stations, as shown in each of the three appraisals, are as follows:

APPRAISALS

	Seller	*Buyer*	*Joint*
WTJH	$1,100,000	$ 575,000	$ 720,000
WMJM-WFAV	800,000	375,000	430,000
WJIZ	1,900,000	1,150,000	1,295,000
Totals	$3,800,000	$2,100,000	$2,445,000

Rivers also submitted an appraisal by a real estate appraiser establishing that a fair rental for the real property to be leased would be $1,309 per month for WJIZ, $2,146 per month for WTJH and $1,970 per month for WMJM-WFAV. James S. Rivers, the owner of the real property, submitted an affidavit which states that he did not charge any rental fees for the use of the property in the past.

5. In order to qualify for distress sale relief, an applicant must establish that the hearing has not commenced, that the proposed transferee is minority controlled and that the stations to be conveyed are not sold at a price which will exceed 75 percent of their fair market value. *DeWitt Broadcasting Co, Inc.*, 48 RR 2d 845, 846 (1980); *Lee Broadcasting Corp.*, 76 FCC 2d 462 (1980). Furthermore, in order to ensure that the rental of real property by the seller does not result in excessive

[5] On the closing date, Silver Star will pay cash for WJIZ and WTJH and execute a negotiable promissory note payable to Southeastern for WMJM and WFAV. The promissory note will be payable at an interest rate of 10 percent per annum and secured by a security interest in the assets of WMJM and WFAV.

consideration, an applicant must establish the reasonableness of that rental. *DeWitt, supra,* at 846.

6. Rivers' Motion for Relief by Distress Sale will be granted. The hearing has not commenced in this proceeding and the proposed purchaser is 51 percent minority owned.[6] Rivers is, therefore, eligible for relief under the Commission's distress sale policy. Moreover, the Bureau is satisfied that Rivers has proposed a legitimate distress sale price for the stations.

7. The procedures that are to be employed by the parties to a distress sale were established by the Commission in *Grayson Enterprises, Inc.*, 77 FCC 2d 156, 163-64 (1980), as clarified by *Patrick Henry,* 79 FCC 2d 393, 395 (1980). The buyer and seller must each retain an appraiser and submit an appraisal of the fair market value of the stations as of the date on which the renewal licenses were designated for hearing. If the difference between the two appraisals is more than 5 percent of the average of the appraisals, the parties must jointly choose and retain a third appraiser who will appraise the value of the stations. The average of the three appraisals will constitute the stations' fair market value. Distress sale relief will be denied where the ratio between the purchase price and the fair market value exceeds 75 percent. In addition, the appraisals must meet the standards enunciated by the Commission in *Northland Television, Inc.*, 72 FCC 2d 51, 56 (1979), as further clarified in *Grayson,* at 164.

8. Here, the buyer's appraisal and the joint appraisal contain analyses which compare the final appraised values with values established by the use of other standard methods of calculating fair market value, such as cash flow, revenue multiples and comparable sales. Both also included detailed schedules showing figures and computations from which those values were derived. Therefore, it appears that both the buyer's appraisal and the joint appraisal meet the standards set forth in *Northland* and *Grayson.*

9. A closer question exists as to whether those standards have been met in the appraisal obtained by the seller from the Holt Corporation, a corporate firm of broadcast facility specialists, appraisers, brokers and consultants. The question assumes greater significance in view of the existence of a substantial disparity between Holt's appraised fair market values and the values established by the other two appraisals. Indeed, the total fair market values of the four stations ascertained by Holt is 81 percent higher than the buyer's appraisal and 55 percent higher than the

[6] Dr. John Robert E. Lee, a Black American, owns 51 percent of the capital stock of Silver Star. He is also the president of the corporation and one of the five corporate directors. The applicant failed to identify any other Silver Star stockholder as a member of a minority group, although two of the other four stockholders were identified as "non-minority individuals" (Tr. 90-91).

joint appraisal. The Commission has never before been confronted with such widely disparate appraisals in a distress sale proceeding. Nonetheless, it was anticipated that appraisals would vary since the Commission directed the use of multiple appraisals to guard against mistakes and collusion. *Northland,* at 56.

10. As originally submitted, the Holt appraisal lacked the necessary supporting data, computations and analysis to permit a meaningful review by the Bureau. For example, although Holt explained that there are three "fundamental approaches" basic to the appraisal process, *i.e.,* market, income and reproduction; there was no discussion or analysis showing the values derived from those different approaches and no reasoned comparison of those values with Holt's final appraised values. Holt mentioned items such as cash flow without specifying the amount involved, failed to show how cash flow was used in deriving any values or how such cash flow values compared with Holt's final figures. Holt discussed in great detail many assets such as studios, offices, program equipment, music library, tapes, files, goodwill, etc., but did not assign any values to those assets. Widely-divergent sale prices of other broadcast stations are listed on several pages, but Holt did not disclose which sale prices were considered comparable or how those prices were used in deriving the final appraised values.

11. In response to a Bureau letter pointing out the above-noted deficiencies, Rivers filed a supplement on February 6, 1984, which included statements from each of the three appraisers relative to the Holt appraisal.

12. In its statement, Holt notes that its determination of value is predicated on the combined value of the asset categories and its opinion of the applicable "fundamental approach" as it relates to each separate property as an operating whole. While acknowledging that each component asset does have an identifiable value, Holt states that the values of the stations are not merely a reflection of the sum of the parts, the average of the market replacement values or income. Instead, those items are simply indicies that lead the appraiser to the overall fair market value conclusion. Holt explains that its appraisal was significantly impacted by its field inspection of each of the properties in question which enabled Holt to assess the management effort. It was determined that the stations were "under-achieving" and would offer "turn-around" potential for a prospective buyer. Noting that the other appraisers did not actually visit the stations, Holt claims that such an inspection would have resulted in higher fair market values by each appraisal firm because of the physicial condition of the stations and "the evident dynamics of their communities of license." According to Holt, all of the facilities are located in markets that are attractive for acquisitions. As a result of its efforts, Holt

minimized an approach that provided a fair market value based on raw cash flow and revenues due to its belief that there is much more to station analysis than "simplistic" formulas and multiples which ignore the reality of the broadcast marketplace. Holt states that the "comparable" section of its appraisal report includes a sampling of reported sales transactions in markets which it believes are "in someway" similar to the properties in question. However, it believes that the buying and selling of stations is an inexact science and did not attempt to identify and isolate specific comparables. Instead, Holt looked at the "comparable universe with an eye to indicated market values" and those comparables were included in its analysis. According to Holt, the appraisal process must rely on the experience of the appraiser as to what a station should be worth in a given market. Holt states that the fair market values reported in its appraisal were based on its experience and judgment and represent its opinion "as to the highest reasonable value stations of this type would command if exposed to the open marketplace."

13. The statement of the buyer's appraiser also emphasizes the subjective nature of broadcast facility appraisals and points out that in his experience no two appraisals of a broadcast facility were ever the same. He states that he has reviewed the Holt appraisal and that all of the factors used by Holt are "valid determinants" in establishing values of a property. More significantly, he does not find the disparity between his appraisal and the Holt appraisal to be unreasonable. The statement of the joint appraiser relates that the method he used in his valuation of Rivers' stations was based on discounted cash flow analysis modified, where necessary, by comparable sales chosen on the basis of specific market characteristics and station technical specifications. However, while he prefers such a methodological approach, he recognizes that other appraisers involved in the broadcast industry employ Holt's more subjective valuation methods. According to the joint appraiser, this subjective approach includes an examination of station technical facilities, an assessment of market attractiveness, a comparison with recent sales of other broadcast properties and other intangibles, such as the station's existing management or sales skill. The joint appraiser also believes that it is understandable that the values assigned to the properties by Holt were different from those developed by his and the buyer's appraisal.

14. In *Grayson*, at 164, the Commission adopted a standard of "reasonableness" for reviewing distress sale appraisals due to the "highly judgmental" nature of the appraisal process and the resulting unacceptable delegation of its decision making authority to private if it accepted all appraisals at face value. The reviewability standard requires that a distress sale appraisal "must be communicative to persons acquainted with the broadcast industry." *Grayson*, at 164.

15. Although the question is close, it is concluded that the appraisal of the Holt Corporation manages to marginally meet that standard, due mainly to the acceptance of its validity by the other two appraisers who had no apparent difficulty in evaluating that Holt appraisal. This conclusion is buttressed by the apparent acceptance of Holt's subjective analytical methodology by other broadcast industry analysts. Accordingly, the Bureau accepts all three sets of appraisals as an adequate basis upon which to determine the fair market value of the distress sale properties.

16. *Grayson,* at 164, provides that the average of the three appraisals will constitute the fair market value of the stations. Here, that computation generates a figure of $2,781,666. The maximum purchase price allowed by the Commission for distress sale relief is limited to 75 percent of that figure, which equates to $2,086,250 in this case. Therefore, since the aggregate purchase price in question totals $2,085,000, the parties have established that the distress sale properties will be conveyed for less than 75 percent of their appraised fair market values. Moreover, the realtor's appraisal of the land and buildings used by the stations provides sufficient assurance that Silver Star will pay a reasonable rental for the real property and that the rent will not result in excessive consideration to James Rivers. Furthermore, as supplemented, the Motion for Relief by Distress Sale adequately complies with the requirement that the parties to a distress sale fully disclose all facts and circumstances bearing on a distress sale proposal in accordance with Section 73.3525(a) of the Commission's Rules. *KND Corporation,* 83 FCC 2d 161, 165-6 (1980).

17. Turning now to an ancilary matter, the Bureau discovered during the course of this proceeding that the 1mV/m contour of WFAV overlaps the 1mV/m contour of WJIZ in violation of Section 73.240 of the Commission's Rules (multiple ownership) due to the common ownership of the licensees of both those stations. A review of the license files reveals that this prohibited overlap existed at the time the WFAV license was first granted to Rivers in 1968 and that the amount of overlap was increased by the grant of a modification to the license of WJIZ in 1971. The Bureau believes, however, that the public interest inherent in a successful completion of the proposed distress sale of Rivers' stations to a minority-owned applicant[7] is such that it far outweighs any detriment caused by the noncompliance with the multiple ownership rule. Moreover, it would be unfair to unduly burden the new minority-owned licensee with the past failure to correct this situation. Thus, we shall grant the transfer applications for WFAV and WJIZ subject to the conditions that: (1) Silver Star may not seek to modify either facility in a manner that would

[7] *See Statement of Policy on Minority Ownership of Broadcast Facilities* and *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting.*

increase the existing lmV/m contour overlap between WFAV and WJIZ and (2) Silver Star is prohibited from transfering both WFAV and WJIZ to the same entity or entities under common control. In effect, the existing multiple ownership violation by WFAV and WJIZ will be grandfathered until any future transfer assignment of those stations by Silver Star.[8]

18. The applications for transfer of control have been processed and Silver Star has been found to be fully qualified to be a Commission licensee as a result of the Mass Media Bureau's review of the transfer applications. Thus, we shall grant the motion for relief by distress sale, the applications for renewal of licenses and the applications for transfer of control of Stations WTJH, WJIZ, WMJM and WFAV, subject to the condition that the contemplated transfer of control is, in fact, consummated within ninety (90) days of the release date of this order. However, if this condition should not occur, this proceeding will return to its hearing status prior to the filing of the instant petition, and the hearing proceedings will resume in accordance with the Commission's previous *Memorandum Opinion and Order,* designating this case for an evidentiary hearing.

19. Accordingly, it is ordered that subject to the conditions imposed in paragraphs 19 and 20 above, the motion for relief by distress sale filed on October 4, 1984, by the above-captioned licensees is granted; the applications for renewal of the licenses for Stations WTJH, WJIZ, WMJM and WFAV (File Nos. BR-811106UA, BRH-811106UE, BR-811106UB and BRH-811106UD) are granted; the transfer of control applications for those stations (File Nos. BAL-831004GS, BAL-831004GT, BALH-831004GU and BALH-831004GV) are granted; and this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSIONS

JAMES C. MCKINNEY, *Chief, Mass Media Bureau*

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[8] Three Silver Star principals are either shareholders or officers of Silver Star Communications, Inc., the licensee of Stations WOKS and WFXE-FM, Columbus, Georgia. The Columbus stations are less than 100 miles from the stations Silver Star will acquire in Albany and East Point, Georgia. However, the common control of those stations, in conjunction with the primary service overlap already existing between two stations, no longer presents an obstacle to a grant of the instant assignment applications because of the Commission's recent elimination of the "regional concentration of control" provisions of Sections 73.35(b)(1), 73.240(a)(2) and 73.636(a)(2) of the Commission's Rules. *News Release,* Mimeo No. 3556, released April 12, 1984. Those sections formerly prohibited the common ownership, operation or control of three commercial AM, FM or television stations where any two are located within 100 miles of the third and there is primary service contour overlap between any of the stations.

Appeal
Discovery

Commission granted appeal barring discovery of materials protected by work product doctrine and attorney-client privilege.
—*RKO General, Inc. (KHJ-TV)*
Docket No. 16679

FCC 84-78

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
RKO GENERAL, INC. (KHJ-TV) Los Angeles, California	Docket No. 16679 File No. BRCT-58
For Renewal of Broadcast License	
FIDELITY TELEVISION, INC. Norwalk, California	Docket No. 16680 File No. BPCT-3655
For Construction Permit for New Television Broadcast Station	

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 1984; Released: March 8, 1984

BY THE COMMISSION:

1. Now before the Commission is an Appeal filed January 24, 1984,[1] by RKO General, Inc. (RKO) seeking reversal of Administrative Law Judge Edward L. Kuhlman's Discovery Order, FCC 84M-272, released January 17, 1984, directing RKO to produce certain documents requested by Fidelity Television, Inc. (Fidelity).[2]

[1] Although the appeal was directed to the Review Board, the matter was properly referred to the full Commission which has elected to retain exclusive review jurisdiction of this expedited proceeding. See Order FCC 83-274, 54 RR 2d 53, at para. 15, released June 8, 1983.

[2] By Order released January 27, 1984, FCC 84M-478, the ALJ granted an extension of time for production of the documents. This circumstance, combined with our ruling on RKO's

2. In his Discovery Order the ALJ directed RKO to make available for Fidelity the following documents and records: "(1) the accounting reports or audits prepared by RKO independent accountants, General Tire independent accountants, or Special Review Committee independent accountants concerning trade and barter transactions of any RKO broadcast station in the period 1972 through 1980; (2) documents that constitute records of interviews conducted by the Special Review Committee, its Special Counsel, or its staff in connection with the Committee's investigation of RKO's trade and barter practices and procedures; (3) all documents that reflect or otherwise relate to the instances of RKO's misuse of barter assets; and [4] all other documents reviewed or generated by the Special Review Committee regarding trade and barter practices and procedures." Fidelity asserted that the requested material was relevant to hearing issue two and reasonably calculated to lead to the discovery of admissible evidence.

3. Issue two seeks determination of whether RKO General, Inc. intentionally filed false and misleading financial reports with the Commission. By way of background a Special Review Committee was appointed by the General Tire Board of Directors in 1976 to conduct an internal investigation of possible misconduct by the parent corporation and its subsidiaries, including RKO.[3] One particular area of the investigation

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appeal, moots the Motion for Stay of the ALJ's Discovery Order filed January 24, 1984, by RKO.

[3] During the 1970's the Securities and Exchange Commission (SEC) engaged in a concerted effort to halt the improper overseas payments of many United States based international corporations. The SEC effectuated its objective by inducing targeted companies to enter into nonculpatory consent decrees. An important aspect of these consent decrees was a provision that the corporation would conduct an internal investigation of its affairs. The mechanics of the program were such that the corporate Board of Directors would appoint from among its outside directors a special review committee. The special review committee was in turn empowered to hire outside counsel. Outside counsel was similarly empowered to hire independent auditors to assist in conducting an exhaustive examination of the targeted corporation. Results of the special review committee's investigation were then to be complied in a comprehensive report and submitted to the company's full Board of Directors and the SEC. The corporation was then expected to adopt and implement any recommendations generated by the special review committee. General Tire and Rubber Company, the parent corporation of RKO General, Inc., was one such company. It entered into a "Consent and Undertaking" on May 10, 1976 formalizing creation of a Special Review Committee and empowering it to hire Special Counsel with authority to contract with independent auditors to complete its investigation of the parent company and its subsidiaries. Copies of the final report were duly filed with the full General Tire Board of Directors, the SEC, and the Court approving the Consent and Undertaking. A copy was also submitted to the Commission in July 1977. For further insight into this practice see *In re Sealed Case*, 676 F.2d 793, 800 (D.C. Cir. 1982), and Note, *Discovery of Internal Corporate Investigations*, 32 Stan. L. Rev. 1163, 1166-1168 (1982).

focused on the barter and trade practices of RKO.[4] The final Report prepared by the Special Review Committee indicated that RKO had not accurately accounted for the value of its barter and trades and consequently annual financial reports submitted by RKO General to the Commission, which reflected the value of this licensee's barter transactions, may have been inaccurate. The Commission reached an adverse conclusion on this matter in denying the RKO renewal applications for stations WNAC-TV, Boston, KHJ-TV, Los Angeles and WOR-TV, New York, 78 FCC 2d 1, 81, 88-89. On appeal the Court of Appeals held that the conclusion that RKO had filed false and misleading financial statements could not be sustained without further evidentiary inquiry.[5] When the Commission remanded the Los Angeles case for further proceedings, it accordingly designated an issue to determine whether RKO intentionally filed false and misleading financial reports with the Commission.[6] Pursuant to this issue, Fidelity has filed the subject discovery request, which the ALJ has granted.

4. RKO raises several arguments on appeal. First, RKO maintains that the requested material is in the possession of the Review Committee's special counsel and the accountants they retained. Hence, they have no control over the desired records. Second, even if they had control, the records are protected pursuant to a confidentiality order issued by the District Court having jurisdiction over the consent and undertaking.[7] Those entities have refused to supply the records in their possession absent court authorization for fear of being in contempt of the Court's confidentiality order.[8] Third, assuming that the records were not subject to the Court order, RKO claims that such records are protected from discovery under the attorney-client privilege and the work-product doctrine. Finally, RKO asserts that it has already made available to Fidelity all of the material given to the Special Review Committee, outside counsel, and independent accountants.

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[4] A "barter and trade" transaction involves the exchange of advertising time for consideration other than normal advertising fees. This transaction is ordinarily made because the broadcaster determines that the advertising time will remain unsold unless special measures are taken; usually the time is exchanged for the advertiser's goods or services, e.g., a car, a hotel room, clothes. The Commission amended its 324 Forms (annual financial reports) in November 1972 to include a line for reporting barter and trade revenue.

[5] *RKO General, Inc.* v. *FCC,* 670 F.2d 215, 225-226 (1981), *cert. denied,* 102 S. Ct. 1974, 2931 (1982).

[6] FCC 83-274, released June 8, 1983.

[7] *Securities and Exchange Commission* v. *The General Tire & Rubber Company and Michael Gerald O'Neil,* Civil Case No. 76-0790, Order, July 12, 1977.

[8] Appeal of RKO, Ex. 1, Attachment 1, letter dated December 16, 1983 from John A. Beck to Timothy B. Dyk, attorney for RKO.

5. In its opposition to RKO's Appeal, Fidelity contends that RKO has waived any protection to which it might otherwise be entitled under the work-product doctrine and the attorney-client privilege. Fidelity points out that RKO waived these protections when it voluntarily filed the Special Report with the Commission and relied on quoted or paraphrased portions of documents underlying the Special Report, especially the audit report prepared by independent accountants and interviews between RKO's controller and the independent accountants. Along these lines, Fidelity puts the onus on RKO to identify any particular documents which it seeks to protect and to permit the Presiding Judge to make an *in camera* review of these documents to test the validity of RKO's claim.

Discussion

6. On analysis we agree with RKO that the disputed material is protected from discovery. In light of this conclusion, it is unnecessary for us to address RKO's arguments concerning questions of control and confidentiality. Instead, we may focus our attention on the merits of RKO's remaining arguments, *i.e.*, that the requested material is protected by the attorney-client privilege[9] and the work-product doctrine.[10]

7. For purposes of our discussion Fidelity's discovery request falls into two broad categories: documents and materials generated by the Special Review Committee and its staff in the course of its internal investigation; and other documents, which were prepared by General Tire, RKO, or their agents. As to the latter category, RKO has agreed to produce all requested materials in its files or in the files of General Tire.[11] As to the former category, we begin with the proposition that all documents that are relevant to the hearing issues and reasonably calculated to lead to the discovery of admissible evidence are to be produced. 47 C.F.R. §1.325(a) (1983). However, there are exceptions to this

[9] A comprehensive definition of the attorney-client privilege is found in *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D.Mass 1950).

[10] The work-product doctrine found judicial expression in *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) and has been codified in Section 26(b)(3) of the Federal Rules of Civil Procedure.

[11] At page two of its appeal RKO states that it has "agreed to produce *all* requested materials from its own files and files of its parent, General Tire, that it has reason to believe the Committee may have reviewed and all of the requested correspondence that it or its parent had with the Committee" (emphasis in original). We view this statement as a commitment to produce all relevant documents and materials other than those generated by the Special Review Committee and we assume that all such materials will be promptly made available, absent a showing of some other basis for withholding them. This will enable Fidelity to review all RKO records examined by the Special Review Committee relating to barter and trade transactions, and will permit Fidelity to reach its own conclusion as to whether RKO misused any of its barter assets and, if so, in what manner.

general rule which serve to protect certain documents from the discovery process. To ascertain whether the materials sought by Fidelity must be produced, we now turn to the case law.

8. As previously indicated, General Tire was just one of many corporations conducting internal investigations of suspected wrongdoing.[12] As a result, a number of cases have already been before the courts dealing with the question of the availability of documents gathered by outside counsel and independent accountants.[13] Generally speaking, the courts have held that discovery of material collected by a Special Review Committee is protected under the attorney-client privilege, if it pertains to communications, and the work-product doctrine, if it is prepared in anticipation of litigation by an attorney or at his direction.[14] In *Upjohn, supra,* the Supreme Court denied a request by the Internal Revenue Service (IRS) for records of a Special Review Committee. The IRS, which had been given a copy of the corporation's report of internal investigation, was seeking the material as part of its own investigation into the tax consequences of certain questionable payments. The Court recognized the importance of discovery, but held that a greater societal purpose would be served by adherence to the protection accorded under the attorney-client privilege and the work-product doctrine. As stated by the Court, the purpose of the attorney-client privilege "is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[15] The privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[16] As in the instant proceeding, the communications were made by corporate employees to counsel for the corporation, acting as such, at the direction of corporation superiors, in order to secure legal advice from counsel.

9. In *Diversified Industries, Inc.* v. *Meredith, supra,* the court was faced with the question of whether a private litigant could obtain the

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[12] See note 3, *supra.*

[13] *Upjohn Co.* v. *United States,* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed. 2d 584 (1981); *In re Sealed Case,* 676 F.2d 793 (D.C. Cir. 1982); *In re Grand Jury Investigation (Sun Company),* 599 F.2d 1224 (3rd Cir. 1979); *In re Grand Jury Subpoena, (John Doe, Inc.),* 599 F.2d 504 (2nd Cir. 1979); and *Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596 (8th Cir. 1977).

[14] *See Upjohn, supra; In re Grand Jury Investigation (Sun Company), supra,* and *In re Grand Jury Subpoena (John Doe, Inc.), supra.*

[15] 449 U.S. at 389.

[16] *Id.* at 390.

report of an internal corporate investigation prepared by outside counsel and independent accountants hired by outside counsel. On examination of the facts the court *en banc* held that an attorney-client relationship existed between the outside law firm and the corporation. Outside counsel was hired to advise the corporation, prepared a comprehensive report and made specific recommendations to be followed by the corporation. The court further concluded that the hiring of a law firm to conduct the investigation *prima facie* established that the corporate client was seeking legal advice and that the report prepared by outside counsel and independent accountants was therefore protected by the attorney-client privilege. As in *Upjohn,* the court held that these protected communications were not available through discovery.

10. Similarly, under the facts of this case the communications between outside counsel and General Tire/RKO employees on the question of barters and trade qualify as privileged communications. Outside counsel was hired not only to investigate corporate practices, but to develop recommendations and to advise the Special Review Committee. Hence, they were acting as attorneys. *Diversified Industries, Inc.,* 572 F.2d at 610. The communications were from employees of the corporation, the client in this case, and the attorneys were acting in their capacity as attorneys. Since the privilege is absolute, once established, it serves to protect the requested communications against discovery. *In Re Grand Jury Subpoena (John Doe),* 599 F.2d at 510. The Court in *Upjohn* went on to say that this privilege extends only to communications: "it does not protect disclosure of the underlying facts by those who communicated with the attorney."[17] Since these facts were not protected, they could be obtained through interviews with those corporate employees who had communicated with special counsel. Similarly, Fidelity is free to question the employees interviewed by special counsel, but may not secure the results of the Special Review Committee's internal investigation by requesting the responses to questionnaires and notes taken by special counsel. *Cf. Upjohn,* 449 U.S. at 396-397. Although this procedure may not be as convenient as Fidelity might like, "considerations of convenience do not overcome the policies served by the attorney-client privilege."[18]

11. Fidelity is also seeking records and documents that go beyond communications between special counsel and its corporate client. Under similar circumstances, the Court in *Upjohn* ruled that such materials were protected from discovery under the work-product doctrine. This doctrine precludes from discovery, "written statements, private memoranda and personal recollections prepared or formed by an adverse party's

[17] 449 U.S. at 395.

[18] *Upjohn,* 449 U.S. at 396.

counsel in the course of his legal duties."[19] This affords an attorney the right to "work with a certain degree of privacy"[20] and helps sustain the vitality of the legal profession.[21] To determine whether particular documents should be afforded protection under the work-product doctrine, the primary consideration is that the material be prepared or collected in the course of preparation for possible litigation.[22]

12. In *In re Grand Jury Investigation (Sun Company), supra,* the Third Circuit upheld denial of a request by the government (United States Attorney's Office of the Eastern District of Pennsylvania) for questionnaires and memoranda compiled by Sun Company and outside counsel during an internal corporate investigation of various foreign transactions. The court held that the material prepared by counsel hired to conduct the in-house investigation was prepared in anticipation of litigation. As here, the investigation concerned suspected criminal violations (improper overseas payments) and subjected the corporation to possible criminal prosecution, derivative stockholder suits, securities litigation and even litigation by the corporation itself to recover illegal payments. Thus, there was ample support for the conclusion that the work was prepared in anticipation of possible litigation. The Court also perceived no reason to distinguish between special counsel's role as a legal advisor and its role as an investigator, noting that the attorney in *Hickman* similarly acted in this dual capacity.[23]

13. The Third Circuit then turned to the general question of whether the materials were entitled to an absolute protection or a qualified protection. It concluded that the material enjoyed only qualified protec-

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[19] *Upjohn,* 449 U.S. at 397, citing *Hickman* v. *Taylor,* 329 U.S. 495 (1947).

[20] *Id.* at 398.

[21] As explained by the Court in *Hickman,* 329 U.S. at 511:

> [M]uch of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

[22] *In re Grand Jury Investigation (Sun Company),* 599 F.2d at 1228, citing *Hickman* v. *Taylor,* 329 U.S. at 505.

[23] 599 F.2d at 1229. A lengthy discussion of this point can be found in *In re Grand Jury Subpoena (John Doe, Inc.),* 599 F.2d 504 (2nd Cir. 1979), where the court held that the work product of outside counsel and independent accountants hired by outside counsel was protected under the work-product doctrine. The court reasoned that outside counsel was hired not only to ascertain the amount, if any of illicit payments, but also to assist the corporation in preparing a report to be submitted to the SEC and to offer advice on possible future litigation including criminal and tax actions as well as stockholders' derivative suits. Hence, counsel was acting in contemplation of litigation and materials collected and prepared for this purpose were protected under the work-product doctrine.

tion, unlike the absolute protection stemming from the attorney-client privilege.[24] However, the court went on to say that the protection would not be lifted to permit discovery except in the rarest of cases. Upon examination of the facts the court there concluded that good cause had not been shown for withdrawing the protection. There had been no effort to secure the testimony of persons interviewed by the Special Review Committee; there had been no substantiated claims that the material was needed to rebut an allegation of fraud or description; and the documents were not needed to corroborate or impeach any statements of witnesses. The court thus concluded "that all the questionnaires and interview memoranda are protected by the work-product doctrine."[25]

14. We conclude that the material Fidelity is seeking was similarly prepared by the special review committee and outside counsel in anticipation of litigation and that these materials are therefore protected from discovery under the work-product doctrine. We further determine that this protection extends to accounting reports and audits prepared by independent auditors as part of the internal investigation.[26] However, Fidelity may overcome the protection of the work-product doctrine upon a sufficient showing of necessity and unavailability by other means.[27] Alternatively, Fidelity may demonstrate that it is entitled to the protected materials upon a showing that RKO has used a "privileged relationship to further a crime, fraud, or other fundamental misconduct,"[28] or that RKO has waived the protection accorded these materials.[29]

15. Under the circumstances presented, we conclude that Fidelity has not made a showing sufficient to overcome the protection provided by the work-product doctrine. We note initially that Fidelity's request contains no showing of substantial need.[30] Nor has Fidelity shown that the material is unavailable through other means or that it could not obtain the needed documents "without undue hardship."[31] Nor has Fidelity estab-

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[24] *See Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596, 602 (8th Cir. 1977).

[25] *In re Grand Jury Investigation (Sun Company)*, 599 F.2d at 1233.

[26] The Court in *Diversified Industries, Inc.*, 572 F.2d at 603, held that: "While the 'work product' may be, and often is, that of an attorney, the concept of 'work product' is not confined to information or materials gathered or assembled by a lawyer." In *United States* v. *Nobles*, 422 U.S. 225 239 n.13 (1975), the Supreme Court noted that the work-product doctrine by necessity applied as well to materials prepared on behalf of counsel. In *In re Grand Jury Subpoena (John Doe, Inc.)*, 599 F.2d at 513, the Court held that accountants' workpapers and all summaries and reports prepared under the direction of counsel for purposes of the internal investigation could qualify under the work-product doctrine.

[27] *Upjohn*, 449 U.S. at 401-402.

[28] See *In re Sealed Case*, 676 F.2d at 807.

[29] *Id.*

[30] *See Upjohn*, 449 U.S. at 401.

[31] *Id.*

lished that General Tire and RKO entered into a relationship with outside counsel in order to commit a crime, fraud or other fundamental misconduct or that it has sought to use this relationship to avoid the consequences of such misconduct.[32] To the contrary, General Tire was motivated to conduct an extensive in-house investigation pursuant to an agreement with the SEC, as approved by the Court. Its efforts were to reveal the facts, not to conceal them or to further a crime or fraud.

16. Fidelity asserts that RKO has waived any claim of privilege because it previously submitted a copy of the Special Report to the Commission. In an analogous situation, Upjohn Company had submitted a copy of the final report of its special review committee to the SEC. Upjohn also voluntarily supplied a copy of this report to the IRS. The Sixth Circuit held that this did not constitute a blanket waiver of the protections arising from the attorney-client privilege and the work-product doctrine, but that it extended only to materials actually supplied.[33] On appeal the Supreme Court sustained the objection to discovery of the special committee's materials. In view of this determination it is clear that the Supreme Court agreed with the Sixth Circuit that Upjohn had not waived any protection accorded the underlying documents which had not been submitted to the IRS. Given the similarity of that case to the instant proceeding, we likewise conclude that there has been no waiver of the protection otherwise accorded these materials. There has been no showing that RKO has submitted any underlying information or that it has relied on any underlying information to support its position under designated issue two.[34] However, to the extent that RKO may rely in the future on selective documents for evidentiary purposes in this proceeding, RKO of course would be required to provide any materials that would otherwise be available for purposes of cross-examination.[35]

17. ACCORDINGLY, IT IS ORDERED, That the appeal filed January 24, 1984, by RKO General, Inc. IS GRANTED, that the Order, FCC 84M-272, released January 17, 1984 by Administrative Law Judge Kuhlman IS SET ASIDE, and that the motion to compel production of documents, filed

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[32] Since the validity of the statements and conclusions contained in the Special Report are not being challenged, there is no reason for RKO to produce underlying documents of the Special Review Committee which are otherwise protected. Compare *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982), in which discovery was permitted under an exception to the work product doctrine and attorney-client privilege due to intentional misrepresentations contained in the report of the corporation there under review.

[33] *United States* v. *Upjohn Co.*, 600 F.2d 1223, 1227 n.12 (6th Cir. 1979).

[34] Although RKO previously submitted the Special Report to the Commission and made arguments therefrom in the Boston proceeding, we find no basis to attribute any greater significance to these facts that Upjohn's submission of its Report to the IRS.

[35] *Cf. A.S.D. Answer Service Inc.*, FCC 84-28, released February 1, 1984, para. 23.

December 5, 1983 by Fidelity Television, Inc. IS DENIED to the extent reflected in this order.

18. IT IS FURTHER ORDERED, That the Motion for Stay filed January 24, 1984 by RKO General, Inc. IS DISMISSED as moot.

19. IT IS FURTHER ORDERED, That the Petition for Waiver of Rule 1.301(c)(7) filed February 6, 1984 by RKO General, IS DENIED.[36]

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

[36] In light of our action herein, RKO's request for waiver of Section 1.301(c)(7) of the Commission's Rules to file a reply pleading is being denied.

Fairness Doctrine, Licensee Obligations
Personal Attack, Broadcaster Obligations
Regarding

Application for review of Mass Media Bureau's ruling of July 29, 1983, denied. When determining whether an issue is controversial and of public importance, the mere number of persons involved need not be a major factor where the complainant has not shown that any substantial number of them are vigorously debating the subject issue. —*United Church of Christ*

FCC 84-90

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaints of

Avery D. Post, President of the United Church of Christ; William P. Thompson, Stated Clerk of the General Assembly of the U.S.A.; Kenneth L. Teegarden, General Minister and President, Christian Church (Disciples of Christ); John H. Burt, Bishop Diocese of Ohio, Episcopal Church; and the General Commission on Christian Unity and Interreligious Concerns of the United Methodist Church; and the Washington Office on Latin America

against

CBS Inc.

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1984; Released: April 13, 1984

BY THE COMMISSION:

1. The Commission has before it an Application for Review of the Mass Media Bureau's ruling of July 29, 1983, filed on September 1, 1983,

by the above-listed complainants (hereinafter churches or complainants).[1] On September 16, 1983, CBS Inc, filed an Opposition to the Application. Complainants filed a Reply to the Opposition on October 6, 1982, and CBS filed a Surreply in Opposition on October 14, 1983.[2]

The Complaint

2. The complaint was based on alleged attacks upon the honesty, character, integrity and like personal qualities of the complainants during the January 23, 1983 broadcast of a "60 Minutes" program segment entitled "The Gospel According to Whom?" The churches defined the controversial issue of public importance during which the alleged attack occurred as an allegation "that the complainants are 'doing the work' of international communism without the knowledge of their members, that it is 'near impossible' to trace church money diverted to communist causes and that church leaders are lying about the whole matter." The complainants asserted that during this discussion the churches were accused of "telling lies . . . just sheer lies," and that this constituted "an attack on the honesty of these churches and their responsible officials." The complainants also maintained that CBS charged church leaders with "hypocrisy, condoning torture and murder, consorting with persecutors of the Church of Christ . . . and other 'evil' behavior."

3. In its response to a letter of inquiry, CBS asserted that the subject report fell within the bona fide news interview exemption to the personal attack rule because segments of the program included news interviews with church leaders. Assuming the program was not exempt, CBS denied that the complainants had established a prima facie case of a personal attack. CBS claimed the discussion did not address a controversial issue of public importance, and in contrast to complainants' issue identification, defined the issue as whether a disparity exists or should exist "between the moral philosophy of congregants and the character of the activities which their collection plate contributions have gone to support.[3] CBS conceded that the complainants were criticized during the subject program. However, CBS maintained that these criticisms did not involve "any charge of criminality, corruption or moral turpitude." Furthermore, CBS asserted that, irrespective of whether a personal attack within the meaning of the rule actually occurred, it satisfied its Fairness Doctrine and personal attack obligations by including in its report extensive responses by church leaders.

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[1] A copy of the Staff Ruling is attached as an Appendix.

[2] Our rules do not provide for "Surreplies" to be filed. However, to the extent that such pleadings in the Fairness/Political area aid the Commission in resolving sensitive issues, we will consider the Surreply.

[3] CBS formulates the subject issue several ways in its pleadings. However, although worded differently, we believe the basic issue is as defined above.

Bureau Ruling

4. The Bureau denied the complaint, finding CBS' determination that no controversial issue of public importance was discussed to be not unreasonable. The Bureau noted that the mere existence of a large church membership does not necessarily show that any substantial number of these members are "vigorously debating" the issue, a requisite for being considered "controversial" under the Fairness Doctrine. Therefore, the Bureau concluded that the question of whether a personal attack occurred did not have to be addressed. With respect to CBS' claim that the subject program was exempt as a news interview program, the Bureau held that the program was a news documentary, which is not exempt from the rule.

Application for Review

5. In its Application for Review the complainants reiterate their complaint. The churches also contend that the Bureau erred in its holding that CBS was reasonable in determining that the issue discussed during the subject program was not a controversial issue of public importance.[4] Complainants assert further that the Bureau erroneously interpreted Commission precedent so as to support its proposition that the subject issue was not controversial or of public importance.[5]

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[4] The complainants argue that "[t]here are at least four flaws in the Staff's analysis":

(a) the Bureau's "acceptance of an obviously overbroad definition of the issue which is not formulated by licensee's responsible journalists but by its counsel after the event";

(b) "the Staff's conclusion that debates within church congregations and regional and national church bodies are 'internal' and not 'public' debates and that the number of persons affected is not significant";

(c) the Bureau's "refusal" to consider statements made by the church leaders as to the existence of vigorous debate between substantial segments of the community; and

(d) the Staff's "failure to give weight to the extensive media coverage of this issue."

[5] In its complaint the churches cited *Stations WGCB and WXUR*, 41 FCC 2d 340 (B/c Bur. 1973), *recon. denied*, 46 FCC 2d 385 (1974), in which the Commission held that it was unreasonable to conclude that an attack on the United Church of Christ for fostering prison unrest and for grants to assist "violent and/or subversive" and "anti-white and militant" groups did not take place during a discussion of a controversial issue of public importance. Complainants argued that "in *WGCB* the subject program 'examined the problems in our nation's prisons, including the causes of prison unrest,' an obvious national concern" (footnote omitted). In the instant case the Bureau agreed with CBS' position and determined that, unlike the broad issues discussed in *WGCB*, this case involved what appeared to be an "internal ecclesiastical question." Therefore, the Bureau concluded that it was unnecessary to resolve the question of whether the language broadcast constituted a personal attack within the meaning of the rule.

Responsive Pleadings

6. In its opposition CBS maintains that the Application for Review was not filed within the 30-day period provided in Commission Rules (47 C.F.R. §§ 1.115(d) and 1.4(b)) and therefore should be dismissed as untimely.[6] CBS also asserts that the Bureau's ruling was proper, and fully consistent with Commission policy and precedent. CBS reiterates its arguments that the report did not contain an attack on the complainants' "honesty, character, integrity or like personal qualities;" and that, in any event, "adequate reply opportunities were provided within the broadcast itself." CBS states that it is not evident that the "disparity" issue is "the subject of vigorous debate with substantial segments of the community in opposition to one another;" nor that the subject issue, which involves only "'a tiny part of [the churches'] entire budget,'" qualified as being controversial and of public importance.

7. In their reply the churches repeat their arguments as to the controversiality and public importance of the subject issue. They maintain that the Bureau formulated the issue differently from CBS.[7]

8. In its surreply CBS criticizes the churches reply as being "semantic quibbling" which in essence cannot change the staff's decision that CBS acted reasonably in defining the subject issue and in determining that it was not controversial and of public importance. CBS again asserts that no evidence was provided to establish that a substantial segment of the religious community was "vigorously debating" the subject issue, nor to establish that the resolution of these questions will significantly affect "the community at large."

Discussion

9. Having carefully examined the pleadings before us, we cannot conclude that complainants have presented any new or additional informa-

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[6] The complaint was dated August 26, 1983, and received in the Enforcement Division on August 31, 1983, two days past the August 29, 1983 due date. The Commission expects complainants to act within the time frames established by the rules. However, in this case it would be in the public interest to proceed on the Application for Review.

[7] Complainants argue that "there are important differences between the staff's formulation in its ruling and the CBS formulation in its opposition":

(a) CBS' definition was "whether there *is* an inconsistency," while the staff's definition was "whether there *should be* an inconsistency";

(b) The Bureau determined that the sole issue, "'concerned the expenditure of church funds,'" and CBS stated that the issue was "whether the church organizations '*have acted in a manner* inconsistent with the religions and moral convictions of the majority'";

(c) The Staff's formulation of the inconsistency issue is stated in general or abstract terms. However, CBS "limits the issue to one of supporting armed violence by Third World groups."

tion or arguments that would warrant reversal of the Bureau's ruling. It should be noted that the Commission will review a broadcaster's decision pursuant to the Fairness Doctrine only to determine whether the broadcaster has acted reasonably under all the facts and circumstances presented, not to determine whether the Commission would have resolved this matter differently. We agree with the Bureau's determination that CBS' formulation of the subject issue was not unreasonable. Complainants assert that the issue is "clearly overbroad" because, although the churches provide assistance in other controversial areas such as "civil rights, . . . peace, . . . sexism, . . . abortion, . . . etc.," the program discusses the disparity issue only in the context of aid to Third World Marxist and/or revolutionary groups. We disagree with complainants' allegation because it is within CBS' journalistic discretion to determine that it was not within the aforementioned areas that they found the "striking philosophical disparity" examined in the broadcast. Moreover, although complainants outline alleged discrepancies between CBS' formulation and their formulation of the issue, they do not indicate why these differences are relevant, or whether the Bureau's decision would have been different had their formulation been employed. We also agree with the Bureau's conclusions regarding the issue's lack of controversiality. We do not question the complainants' allegation as to the size of the congregation. However, we have previously held that "the number of persons involved herein need not be a major factor in determining whether a controversial issue [of public importance] was presented by the broadcast of the announcement in question."[8] Consequently, CBS was not unreasonable in determining that even though the complainants made frequent reference to the large size of the congregation, they did not establish that any substantial number of them were "vigorously debating" the subject issue. Furthermore, a careful review of the legal precedent which the Bureau relied upon in its ruling does not indicate that the staff misinterpreted Commission precedent or policy.[9]

10. Regarding the extensive media coverage which the churches claim was given to the issue subsequent to the "60 Minutes" program, CBS denies that the media coverage involved the disparity issue. Although, we have held it "is possible . . . that programs initiated with no thought on the part of the licensee of their possible controversial nature will subsequently arouse controversy and opposition of a substantial nature which will merit presentation of opposing views,"[10] the subsequent controversy must involve the issue discussed during the subject program, not merely the fact that the program was broadcast. Furthermore, the complainants

[8] *National Association of Government Employees*, 41 FCC 2d 965, 966-67 (1973).

[9] See paragraph 12 of the staff ruling.

[10] *Fairness Report*, 48 FCC 2d 1 at 12, quoting *Report on Editorializing*, 13 FCC at 1251.

do not refute CBS' claim that most of the subsequent news coverage listed dealt predominantly or entirely with the complaints' dissatisfaction with the report and their demand for reply time.[11] Therefore, we agree with the Bureau that the sole issue involved in this case was concerned with the distribution of church funds, and that CBS was not unreasonable in determining that this, in itself, was not a controversial issue of public importance either prior or subsequent to the broadcast, which would made the personal attack rule apply to the broadcast if not otherwise inapplicable. Furthermore, we agree that in light of the above discussion it was unnecessary to reach the question whether the material broadcast contained personal attacks on complainants. The personal attack rule requires that the attack occur during the discussion of a controversial issue of public importance, and the mere fact of an attack does not constitute such an issue. *See Amendment of Part 73*, 8 FCC 2d 721 (1967).

11. Accordingly, in view of the above considerations, the Application for Review filed by the complainants IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

[11] In an attempt to substantiate its allegation that the issue was controversial subsequent to the broadcast, the complainant merely provides a list of publications which it claims covered the issue. Not only did the complainant fail to provide the Commission with the alleged articles, it did not even furnish the titles of these articles.

8330-L C4-867

APPENDIX

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Complaints of

Avery D. Post, President of the United Church of Christ; William P. Thompson, Stated Clerk of the General Assembly of the United Presbyterian Church in the U.S.A.; Kenneth L. Teegarden, General Minister and President, Christian Church (Disciples of Christ); John H. Burt, Bishop, Diocese of Ohio, Episcopal Church; and the General Commission on Christian Unity and Interreligious Concerns of the United Methodist Church; and the Washington Office on Latin America

against

CBS Inc.

Staff Ruling

Adopted: July 26, 1983; Released: July 29, 1983

BY THE CHIEF, FAIRNESS/POLITICAL PROGRAMMING BRANCH:

1. We have before us two complaints, one filed March 3, 1983, by Avery D. Post, President of the United Church of Christ; William P. Thompson, Stated Clerk of the General Assembly of the United Presbyterian Church in the U.S.A.; Kenneth L. Teegarden, General Minister and President, Christian Church (Disciples of Christ); John H. Burt, Bishop, Diocese of Ohio, Episcopal Church; and the General Commission on Christian Unity and Interreligious Concerns of the United Methodist Church (hereinafter churches or complainants), and the other filed by the Washington Office on Latin America (WOLA). The complaints are brought against CBS Inc., and are based on alleged attacks upon the honesty, character, integrity and like personal qualities of both complainants during a January 23, 1983 broadcast of a "60 Minutes" program segment entitled "The Gospel According to Whom?"

I. *The Churches*

2. The churches define the controversial issue of public importance during which the attacks occurred as "that the complainants are 'doing the work' of international communism without the knowledge of their members, that it is 'near impossible' to trace church money diverted to communist causes and that church leaders are lying about the whole matter." They assert that during the program the churches were accused of " 'telling lies . . . just sheer lies . . .' " which constitutes "an attack on the honesty of these churches and their responsible officials." Further, complainants maintain that CBS charged church leaders with "hypocrisy, condoning torture and murder, consorting with persecutors of the Church of Christ . . . and other 'evil' behavior."

3. In response to this complaint we sent CBS a letter of inquiry requesting that it submit specific information to enable us to resolve the matter. In its response filed March 31, 1983, CBS asserts that the subject report falls within the news program exemption to the personal attack rule because segments of the program included interviews with church leaders. CBS

defines the issue discussed during the subject program as "whether the National Council and World Council and various church organizations with which they are associated have acted in a manner inconsistent with the religious and moral convictions of the majority of their constituent churchgoers by supporting Third World groups which use or advocate the use of armed violence to achieve political ends." Further, it denies that this issue was either "controversial" or of "public importance," or contained "an attack upon the 'honesty, character, integrity or like personal qualities' of the complainants" or any other person or group. CBS maintains that the criticisms directed at complainants in the report did not involve "any charge of criminality, corruption or moral turpitude." CBS also asserts that even assuming a personal attack had occurred during the discussion of a controversial issue of public importance, "the inclusion in the report of extensive responses by church leaders – leaders of the organizations on which the report explicitly focused," satisfied its fairness and personal attack obligations.

4. On April 13, 1983, the churches filed a reply to CBS' March 31, 1983 letter. Complainants argue that (1) the subject "program [was] not exempt as a series of bona fide news interviews" because these interviews were nothing more than noncontinuos, disconnected portions which "were interwoven with file material to illustrate the program's 'central issue' "; (2) the issue discussed in "The Gospel According to Whom?" was controversial *and* of public importance; (3) the churches were accused of engaging in " 'acts in support of international communism without the knowledge of their members,' " and " 'telling lies . . . just sheer lies,' " which constitute attacks on the "honesty, character, integrity and like personal qualities" of church leaders; and (4) "[t]he excerpts from interviews with [church leaders did] not meet the requirements of the personal attack rule" because complainants were not provided with a transcript and although they were familiar in a "general way" with the overall issue of the program, they did not know about "the specific charges, nor of [Richard] Neuhaus' charge of lying, consorting with torturers and murderers, etc."

II. *The Washington Office on Latin America*

5. WOLA defines the controversial issue of public importance as "whether church organizations should use parishioner contributions to support political movements and in particular Marxist movements or those that advocate or condone the use or armed violence to achieve political ends." The complainant alleges that it was "referred to as having 'released' a document identical to a KGB forgery." WOLA further explains that "these statements were made in the direct context of a discussion of support by religious organizations, including the National Council of Churches, for Marxist political movements." WOLA also asserts that it was in effect referred to as a front for the alleged "covert church activities designed to aid Marxist groups." Complainant states that "the clear import of the reference to WOLA was that it was using the church funds to support Marxist activities and was acting in complicity with the KGB in the 'release' of forged documents."

Discussion

6. The personal attack rule is a particularization of the Fairness Doctrine. The Fairness Doctrine requires broadcasters to present controversial issues of public importance and to afford reasonable opportunity for the discussion of contrasting viewpoints in their overall programming when one side of such an issue is aired. The personal attack rule is contained in Section 73.1920 of the Commission's rules, and provides in pertinent part:

> (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group, attacked:
>
> (1) Notification of the date, time and identification of the broadcast;

(2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and

(3) An offer of a reasonable opportunity to respond over the licensee's facilities.

7. The provisions of the personal attack rule do not apply to broadcast material which falls within one or more of the following categories:

(a) Attacks made in bona fide newscasts, news interviews and on-the-spot coverage of bona fide news events, including news commentary or analysis that is contained in any of these kinds of news programs. (However, the exemption does not apply to station editorials.)[2]

(b) Attacks on foreign groups or foreign public figures.

(c) Attacks against anyone if made during appearances on stations by legally qualified candidates for public office.

(d) Attacks made by legally qualified candidates for public office or their spokespersons or persons associated with them in the campaign against other candidates or their spokesperson or persons associated with them in their campaign.

8. Personal attacks are not prohibited. If a licensee airs a personal attack, it must notify and afford an opportunity for response to the individual or group attacked. The licensee is not required to apologize or make restitution, since the personal attack is designed to ensure the public's right to know, rather than redress any loss allegedly suffered by the attacked individual or group. The primary distinction between the requirements of the Fairness Doctrine and those of the personal attack rule is that in the case of a personal attack the licensee is obligated to offer an opportunity to respond to the particular person or group attacked. If the complaint involves a Fairness Doctrine violation the licensee is required to afford an opportunity for the presentation of contrasting viewpoints by *any* spokesperson[s] that the licensee reasonably and in good faith chooses.

9. As noted above, the personal attack rule applies only to broadcasts that discuss one side of a controversial issue of public importance. Therefore, before the personal attack rule can be held applicable to broadcast matters it must first be determined whether the subject issue is controversial *and* of public importance. The Commission succinctly set out its standard as to whether an issue is controversial in its *Fairness Report*, 48 FCC 2d 1, 12 (1974):

> [I]t is highly relevant to measure the degree of attention paid to an issue by government officials, community leaders, and the media. The licensee should be able to tell, with a reasonable degree of objectivity, whether an issue is the subject of vigorous debate with substantial elements of the community in opposition to one another.

Whether an issue is of public importance depends on an "evaluation of the impact that issue is likely to have on the community at large" (footnote omitted). *Id.* There are many issues that are newsworthy, but which are not controversial or of public importance. *Healey v. FCC*, 460 F.2d 917 (D.C. Cir. 1972). This determination initially is to be made by the licensee, who is called upon to exercise his judgment on this issue. The Commission's role is not to

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[1] CBS claims that "The Gospel According to Whom?" is a series of five "bona fide news interviews" and, therefore, exempt from the personal attack rule. However, we agree with complainant that "none of the discussions concerned any current event," and that rather than being a series of bona fide news interviews the program consists of "disconnected pieces of the interviews [which] were interwoven with file material to illustrate the program's 'central issue.'" Therefore, the program appears to be a documentary, which is not exempt from the rule, rather than a news interview program.

substitute its judgment for that of the licensee on these matters, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. *Sidney Willens and Russell Millin*, 33 FCC 2d 304 (1972).

10. The churches define the issue discussed in "The Gospel According to Whom?" as "that the complainants are 'doing the work' of international communism without the knowledge of their members, that it is 'near impossible' to trace church money diverted to communist causes and that church leaders are lying about the whole matter." CBS defines the subject issue as "whether a disparity should exist – between the moral philosophy of congregants and the character of the activities which their collection plate contributions have gone to support . . .." After a careful review of the information provided it appears that CBS' formulation of the issue discussed during "The Gospel According To Whom?" was not unreasonable.

11. The churches argue that the issue involves "more than 40 million persons." However, whether we use CBS' or the complainants' versions of the issue which was discussed during the subject program, we can not find that CBS was unreasonable in determining that the issue was not controversial and of public importance. In a case where a small number of persons were involved, we stated that "the number of persons involved herein need not be a major factor in determining whether a controversial issue [of public importance] was presented by the broadcast of the announcements in question." *National Association of Government Employees*, 41 FCC 2d 965, 966-67 (1973). CBS believed that the issue of the Protestant churches' fund expenditures did not involve a controversial issue of public importance because it was "an internal debate concerning the disposition of a 'tiny part of [the] entire budget' of [several] church organizations" and not generally controversial to its viewing audience. The churches have not furnished us with any information to indicate that there was a public debate or controversy regarding the expenditure of church funds so as to create a controversial issue of public importance.[2] Moreover, the fact that the churches' membership may be 40 million does not necessarily show that any substantial number of these members are "vigorously debating" the issue. Unless there is such public debate or controversy, the issue of church expenditures would not come under the Fairness Doctrine. As we previously noted, the issue is not whether the Commission would have resolved this matter differently, but whether CBS acted unreasonably or in bad faith in determining that the issue of church fund expenditures was neither controversial nor of public importance. Unless there is an indication of public controversy, the Commission will not upset the judgment of the broadcaster. See *Minnesota Farmers Union*, 88 FCC 2d 1455 (1982).

12. The churches also refer to *Stations WGCB and WXUR*, 41 FCC 2d 340 (B/c Bur. 1973), *reconsideration denied sub nom. Benedict P. Cottone*, 46 FCC 2d 385 (1974), in which the Commission held that it was unreasonable to conclude that an attack on the United Church of Christ for fostering prison unrest and for grants to assist "violent and/or subversive" and "anti-white and militant" groups did not take place during a discussion of a controversial issue of public importance. Complainants argue that in *WGCB* "the monetary value of the grants, the number of persons participating in the activity, the number of persons affected, the governmental involvement and the media attention were all small in comparison with the present case." However, in *WGCB* the subject program "examined the problems in our nation's prisons, including the causes of prison unrest,"[3] an obvious national concern. Instead of the broad issues discussed in *WGCB*, the instant case involves what appears to be an internal ecclesiastical question. The only issue here concerned the expenditure of church

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[2] For instance, the two specific examples of "vigorous debate" provided by the churches occurred at a regional conference of the United Methodist Church and the 130th Council of the Diocese of Texas of the Episcopal Church, neither of which appear to have been *public* debates, but rather are examples of "internal" debate.

[3] 41 FCC 2d at 341.

funds, and we do not believe CBS was unreasonable in determining that this in itself was not a controversial issue of public importance which would invoke the personal attack rule. Therefore, it is not necessary to reach the question whether the material broadcast contained personal attacks on complainants since an attack, itself, does not constitute a controversial issue of public importance. See *Amendment of Part 73*, 8 FCC 2d 721 (1967).

13. WOLA argues that "[a]llegations that it released forged documents constitute an attack on its honesty and integrity." To substantiate this assertion WOLA states that it "engages in the dissemination of information on Latin America and to accuse it of distributing forged documents draws into question its honest[y] and integrity as an organization." WOLA provides no further information to corroborate its allegations. However, regardless of whether WOLA had substantiated its assertions as to the existence of an attack upon its honesty and integrity, for the reasons stated above we cannot find that the attack occurred during the discussion of a controversial issue of public importance.

14. Therefore, we believe complainants failed to establish that the licensee's judgment as to the existence of a controversial issue of public importance was unreasonable or made in bad faith and, therefore, the complaints filed by the churches and the WOLA ARE DENIED.

15. Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of public notice of this document (see Commission Rule 1.4(b) [47 C.F.R. § 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Commission Rule 1.115 (47 C.F.R. § 1.115).

FEDERAL COMMUNICATIONS COMMISSION

MILTON O. GROSS, CHIEF *Fairness/Political Programming Branch*
Enforcement Division
Mass Media Bureau

Comsat, as Common Carrier
Comsat Earth Station Complex
Intelsat
International Communications Satellite

Notice of Proposed Rulemaking adopted re modification of policy on ownership and operation of U.S. earth stations that operate with the INTELSAT global communications satellite system.
—*U.S. Earth Stations*
CC Docket No. 82-540

FCC 84-122

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Modification of policy on ownership and operation of U.S. earth stations that operate with the INTELSAT global communications satellite system.	**CC Docket No. 82-540**

NOTICE OF PROPOSED RULEMAKING

Adopted: March 30, 1984 Released: April 20, 1984

BY THE COMMISSION:

I. *Introduction*

1. On August 17, 1982, we initiated the captioned proceeding to solicit comments on whether our current policy, established in 1966, on the ownership and operation of U.S. earth stations which operate with the INTELSAT global communications satellite system still serves the public interest.[1] Under our current policy, international earth stations in the United States are owned by a consortium of carriers, including the Communications Satellite Corporation (Comsat) and certain U.S. international service carriers.[2] These international service carriers are the American Telephone and Telegraph Company (AT&T), RCA Global Communications, Inc. (RCA), ITT World Communications Inc. (ITT),

[1] 90 FCC 2d 1458 (1982).

[2] Ownership and Operation of Earth Stations, 5 FCC 2d 812 (1966).

Western Union International, Inc. (WUI), and the Hawaiian Telephone Company (Hawaiian). Comsat, through its World Systems Division, has a 50 percent ownership share and the international service carriers share the remaining 50 percent interest in approximate proportion to their usage.[3] Comsat serves as manager of the stations subject to overall control and guidance on basic policy and investment matters by a committee composed of all co-owners. Voting shares within this committee are in accordance with ownership percentages.

2. The policy enunciated in 1966 was implemented in 1967 by Comsat and the U.S. international service carriers through a carrier created Agreement establishing the Earth Station Ownership Committee (ESOC). This Agreement, as amended, [4] set up separate earth ownership consortiums for the contiguous United States, Hawaii, and Guam. It also fixed, in accordance with the 1966 policy decision, the percentage ownership shares for Comsat, AT&T, Hawaiian, ITT, RCA, and WUI.[5] The Agreement provides that ESOC earth stations are to be made available to Comsat for the purpose of furnishing earth station and space segment communications services under applicable tariffs to authorized carriers and users. Comsat, in turn, compensates the carriers for their investment by paying them a monthly rental rate for each half-circuit established through the stations.

3. Below we shall discuss: (a) the Notice of Inquiry (NOI); (b) the comments and reply comments; (c) a subsequent proposal by Comsat; (d) the comments and reply comments submitted in response to Comsat's proposal; and (e) several recent developments which highlight the need for a fresh look at our earth station ownership policy. We shall then make several tentative conclusions based upon our analysis of the record and explain the major characteristics of the new earth station ownership arrangement that we envision.

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[3] While earth stations are jointly owned, Comsat is the sole U.S. investor/provider of INTELSAT space segment and is also the sole U.S. representative to INTELSAT.

[4] The Agreement was amended to add Guam as a separate consortium. Puerto Rico/Virgin Islands it also a consortium but is has no earth stations at this time and does not hold meetings.

[5] The carriers' ownership shares were allocated in 1967 (continental United States and Hawaii) and 1969 (Guam) in proportion to their projected use of the stations within the separate consortiums. Since 1969, however, we have approved requests by ESOC members for certain modifications in ownership shares including: (a) purchase by AT&T of ITT's share in the four contiguous U.S. stations and; (b) purchase by RCA of ITT's share in the Guam earth station. We have also authorized 100 percent ownership of earth stations to Comsat where: (a) it is directly serving end users (TV service via Santa Paula, California earth station) and; (b) where the local carrier does not desire joint ownership (American Samoa, Palau, Saipan, Marshall Islands, and Micronesia).

A. *Notice of Inquiry*

4. For the purpose of eliciting discussion on possible changes in our earth station ownership policy and the carriers' ownership arrangements, we defined in the NOI two classes of earth stations. General purpose earth stations are those Standard A (30-32 meters in diameter), Standard B (10-13 meters in diameter), and Standard C (18-19 meters in diameter) facilities with which all authorized U.S. international carriers interconnect their operating centers in order to offer international switched and private line services to the public. The ESOC earth stations, such as those Etam, West Virginia, Andover, Maine, Brewster, Washington, Jamesburg, California, Paumalu, Hawaii, and Pulantat, Guam are general purpose earth stations. Special purpose earth stations are Standard B or non-standard earth stations designed to meet private line needs of a dedicated user or group of users. Comsat's earth station at Santa Paula, California for television service to Australia is a special purpose earth station. Special purpose earth stations are envisioned to be located near a customer's premises in order to reduce landline interconnection costs, improve quality of service or both.[6] We also distinguished in the NOI between existing stations and new stations.[7]

5. As to existing general purpose earth stations, which are owned by ESOC, we asked for comments on the merits of individual ownership versus continued consortium ownership. On the individual ownership option, we requested specific comment on the benefits on non-ESOC ownership as well as any disadvantages arising from technical, economic, optional, or foreign policy considerations that might be associated with a change in current policy. We also asked whether Comsat should retain an automatic 50 percent ownership share in these stations (should we decide to continue consortium type ownership) rather than a share proportionate to its actual usage in providing end-to-end services.

6. As to new general purpose earth stations, we asked for comments on the benefits of individual ownership versus a Commission mandated ESOC-like arrangement. As to individual ownership, we again asked for proposed regulatory criteria, including cost/benefit trade-offs that we should apply in deciding whether or not to authorize these new earth stations. As to ESOC-type ownership, we asked for comment on Comsat's role and ownership arrangement.

7. We did not ask for comment on existing special purpose earth stations as they are not owned by ESOC, but by Comsat or other carriers.

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[6] The Santa Paula special purpose earth station for international television service is located relatively close to Los Angeles, California, and the various television studios located in and near that city.

[7] Existing stations were considered to be stations that have been authorized, whether or not they were actually operating or even under construction.

We did not envision the possibility of bringing these within the ESOC structure. As to new special purpose earth stations, we requested comment on whether they should be owned and operated in a competitive fashion or in an ESOC-like manner. Again, we requested comment on regulatory criteria for considering individual applications and also on the appropriate role for Comsat if a consortium approach were adopted.

8. Additionally, we asked for comments on the relationship of Comsat's corporate structure to the issues in the proceeding. One issue we identified is whether Comsat's ownership of new earth stations should be in the parent company's World Systems Division (WSD), as currently structured, or in a separate subsidiary. Another question is whether Comsat's current ownership share of general purpose earth stations should be transferred from WSD to a Comsat subsidiary. Finally, we raised the issue of segmenting Comsat's existing tariff, which bundles the earth station and space segment elements into one rate, if entities other than Comsat or ESOC were to be authorized to construct and operate international earth stations.

B. *Comments and Reply Comments on the Notice of Inquiry*

9. We received comments from fourteen parties and reply comments from thirteen parties. These parties were carriers (Comsat, AT&T, ITT and All America Cables and Radio filing jointly, RCA, WUI, Western Union Telegraph Company, Hawaiian, TRT Telecommunications Corporation, and American Satellite Company) governmental entities (Departments of Defense and Justice), users (Home Box Office, National Public Radio, American Petroleum Institute, and ABC, NBC, and CBS filing jointly), and a satellite/earth station equipment manufacturer (M/A-COM).

10. All parties with the exception of Comsat advocated a more open policy on ownership and operation of international earth stations.[8] The parties favoring an open entry policy generally did not distinguish between general and special purpose earth stations. Instead, they divided earth stations into two categories: existing and new. As to new earth stations, they proposed that any carrier be allowed to apply to the Commission for authorization subject only to the "public interest, convenience, and necessity" test of Section 201(c)(7) of the Communications Satellite Act.[9] Parties differed, however, on the kinds of factors they believed should be considered by the Commission under this test. Most,

[8] Comsat stated that the existing arrangement provided for a low cost and high quality service. It argued that independent ownership would promote a proliferation of stations that could harm U.S. and INTELSAT interests.

[9] 47 U.S.C. § 721 (c).

including AT&T, advocated the use of all relevant technical, economic, and foreign policy factors. But one party, RCA, proposed the consideration of only frequency coordination (interference) as the relevant criterion. As to existing stations, the parties had two divergent views. One group, including Comsat, RCA and Hawaiian Telephone, wanted to retain the present ESOC joint ownership arrangements. Another group, including AT&T and WUI wanted to dissolve ESOC. The group proposing dissolution of ESOC would leave it to the ESOC owners, in the first instance, to propose to the Commission a plan for this breakup. This plan would be presented to the Commission at the end of negotiations.[10] The parties advocating a more open ownership policy also argued that such an arrangement will provide substantial benefits to users. Additionally, in this and other proceedings, these parties have contended that Comsat's rates are excessive and that a more competitive earth station ownership policy, coupled with an unbundling of Comsat's tariff, will lead to lower end-to-end rates.

11. The parties also submitted comments on a number of other issues. These included the proper role of Comsat, as Signatory, in any ownership arrangement for earth stations; the method of coordinating U.S. earth station investment and operation with INTELSAT space segment investment and operation; the methodology for unbundling Comsat's current combined tariff into separate earth segment and space segment tariffs; the desirability of offering various types of cost-based pricing in earth segment and space segment tariffs; and the need for greater public and carrier participation in Comsat/INTELSAT forums. A full description of the parties' filings is found in Appendix A.

C. *Comsat Proposal*

12. On June 23, 1983, Comsat moved for leave to file a pleading titled "Proposal for Restructuring Earth Station Ownership and Operating Arrangements". In this pleading Comsat stated that since its views on preserving the status quo had not been accepted by other parties it now proposed a new approach that would preserve the benefits of the present arrangements (e.g., efficient use of the INTELSAT system and the ability of actual and potential U.S. carriers which are competitors in the provision of end-to-end international communications services to obtain fair and equitable access to the INTELSAT system) while being more acceptable to other interested parties. Because of Comsat's position as manager and 50 percent owner of the ESOC earth station network, and the potential

[10] NPR stated that it is the Commission's responsibility to weigh the benefits of customer choice against the current need to guarantee the provision of high quality, efficient service to the public in determining whether or not to authorize independent stations. NPR recognizes the possible benefits of increased competition but emphasizes that its major concern is to maintain service quality.

changes in its position as a result of this rulemaking, the Commission granted Comsat's motion.[11]

13. The key elements of Comsat's proposal are as follows. The present ownership arrangement providing for joint ownership of earth station facilities would be dissolved. All present ESOC stations would be converted into "wholesale/retail" combination stations at which Comsat's international "wholesale" facilities and operations, as well as the carriers' end-to-end "retail" facilities and operations, would be colocated. Comsat would provide earth station services and the INTELSAT space segment to the end-to-end service carriers. The end-to-end service carriers would provide a through service to their customers which included the use of facilities provided by Comsat. Following a three year moratorium period, the end-to-end "retail" service carriers would have the option of continuing to participate in combination earth station arrangements and/or seeking authority to construct and operate their own general purpose earth stations.[12]

14. Under Comsat's proposal the ESOC joint owners would negotiate the dissolution of the consortiums and a division of the earth station assets. As the "wholesale" provider, Comsat would acquire the land, buildings, antennas, and most of the common electric equipment. The carriers, as "retail" end-to-end providers, could own certain electronic equipment peculiar to their needs, but could also lease similar equipment under tariff from Comsat if they so desired. Comsat, therefore, would offer a variety of earth station service options and would tariff these services according to their costs. Comsat has also proposed that all of its ownership interests and associated tariffs be placed within its World Systems Division, which under Comsat's current structure is the U.S. Signatory to INTELSAT and sole investor/provider of INTELSAT space segment.

D. *Second Round Comments*

15. In accepting Comsat's "Proposal" as comments for the record, we reopened the docket for additional comments and replies by other interested persons. We received 14 comments and 5 replies. Comments were filed by carriers (AT&T, ITT and AAC&R filing jointly, Hawaiian, TRT Telecommunications Corporation, American Satellite Corporation, Western Union Telegraph Company, WUI, RCA, and Western Systems), a governmental entity (National Telecommunications and Information Administration), users (Home Box Office, the International Communications Association, and ABC, NBC, and CBS filing jointly), and an equipment

[11] Earth Station Ownership, Mimeo No. 5713 (released August 2, 1983).

[12] Applications for IBS and certain small earth stations, however, could be submitted to the Commission prior to the end of this transition period under Comsat's Proposal.

manufacturer (M/A-COM). Replies were filed by Comsat, the International Communications Association, RCA, the National Telecommunications and Information Agency (NTIA), and ITT and AAC&R filing jointly.

16. The commenting parties were particularly divided on the merits of Comsat's proposal dealing with the existing ESOC stations. As indicated, Comsat had proposed converting these stations to "wholesale/retail" facilities. Although some saw this proposal as a starting point for negotiations among the ESOC owners, others were totally opposed to it. Some parties, including AT&T, proposed alternative approaches, including (a) transferring ownership of some stations on an individual basis to carriers who would use them for their own service requirements or, (b) restricting joint ownership to end-to-end retail carriers who would participate in proportion to their share of end-to-end traffic. Hawaiian favored retention of the present ESOC arrangement.

17. As to the merits of Comsat's proposal of a three-year moratorium on new applications for all general purpose stations and most special purpose stations the commenting parties were not divided. Rather, they uniformly opposed such an approach. Most contended that the Commission should immediately begin to consider individual applications, even before any decision is made on the disposition of the present ESOC investment. Any moratorium, they argued, could give an anti-competitive head start to Comsat (and ESOC) in the earth station services market.

E. *Recent Developments*

1. Petition to Realign ESOC Shares

18. An ESOC matter which was recently resolved by the Bureau and affirmed by us today highlights the existing tensions within ESOC and the need for us to re-examine our present earth station ownership policy. In January 1983, RCA advised Comsat and the other joint owners of the one Hawaiian and four continental United States earth stations that it would not make any further capital contributions in these earth stations until its ownership share was reduced to approximate its current relative usage. WUI subsequently took the same position. Both RCA and WUI argued that the ESOC Agreement, which was accepted by the Commission, permitted this method of readjusting ownership interests to a level corresponding to current usage of the earth stations. Comsat, on the other hand, argued that Commission approval is a prerequisite to any readjustments among the ESOC participants. The Bureau found that the 1966 policy order and subsequent construction/transfer orders required Commission approval of any modification of ownership shares and capital contribution obligations. Therefore, unless RCA and WUI remedied any deficiencies in their capital accounts they would be in violation of

Commission policies.[13]

2. Introduction of INTELSAT Business Services (IBS)

19. In June 1983, INTELSAT announced the parameters and charging policy for a new offering called INTELSAT Business Services (IBS). Comsat has filed an application to provide this service to U.S. carriers which we grant today. Application File No. I-P-C- 83-009. By means of these new business services, INTELSAT anticipates that carriers will be able to establish for their customers dedicated international communications networks employing a large number of customer-premise earth stations to carry all types of digital communications services, including video conferencing, facsimile, and highspeed data transfers. INTELSAT has based charges for IBS on the amount of capacity used, rather than on the specific type of service involved. Unit capacities vary between 64 kilobits per second and 2.048 megabits per second. Fractional or full transponder allocations may also be available. Charges also depend on a number of other factors, including the duration and the number of countries and type of earth stations in a communications network.

20. IBS customers will be able to establish networks with global coverage and connectivity by using the $^{11}/_{14}$ (and/or $^{12}/_{14}$) Ghz spot beams for heavy traffic paths as well as the wider $^{6}/_{4}$ Ghz beams. To provide access to IBS using $^{11}/_{14}$ (and/or $^{12}/_{14}$) Ghz frequency bands, INTELSAT has promulgated various Standard E earth station antenna specifications. These relatively small antennas range in size from 3.5 to 8 meters in diameter. For areas of the world where IBS would operate in the $^{6}/_{4}$ Ghz frequency band, INTELSAT has also prepared specifications for Standard F stations ranging from 5 to 9 meters in diameter. INTELSAT expects that the added convenience, reduced construction costs and the lower terrestrial haul costs associated with smaller Standard E and F earth stations located near the customer will more than offset the relatively higher satellite access charges associated with them.

21. INTELSAT has indicated that three IBS network concepts are possible. The selection of one or more of these will be a matter for each user country. The concepts are:

(1) User Gateway network–where an international business user would locate a small Standard E or F earth station on or near its premises, minimizing the need to use and the cost of switched network terrestrial connecting facilities.

(2) Urban Gateway network–where a community of users in one area shares a small Standard E or F earth station.

(3) Country Gateway network–where the users in a country access the service through large Standard A, B, or C earth stations.

[13] Joint Request of Comsat and RCA, Mimeo No. 1202 (released December 9, 1983), *Applications for review denied*, FCC 84- (released April xx, 1984).

3. Application by Comsat for Construction and Operation of an IBS Station

22. Another recent event that is important is Comsat's Application File No. CSG-83-034 P/L to construct and operate international earth station facilities at the New York Teleport Complex for the provision of IBS.[14] Comsat states that it has attempted to convince its ESOC partners to join in this application but that they have refused. Comsat has, therefore, proposed that this station be operated as a combination "wholesale/retail" station, i.e., a station at which Comsat provides space segment and earth station facilities to the various international service carriers who in turn provide end-to-end services to their customers. Other parties have opposed this application arguing that no action should be taken until we complete our comprehensive review and possible revision of our current ownership policy. Other objections to this application also include the failure of Comsat to change its application from that of the World Systems Division to a separated Comsat subsidiary and the alleged failure of Comsat to demonstrate that its use of the Teleport location would not preclude other parties from obtaining similar access. We grant Comsat's application today conditioned on our ultimate policy determinations in this docket.

4. Applications by IRI for Construction and Operation of two IBS Stations

23. In addition to Comsat, International Relay, Inc. (IRI) has also filed for authority to construct and operate IBS stations. IRI's first application (File No. CSG-84-011-P/L) requests authority to construct and operate $^{11}/_{14}$ Ghz and $^{12}/_{14}$ Ghz earth station facilities in the vicinity of Chicago, Illinois for the provision of IBS. The proposed station is of the Standard E design and would serve the commercial district of Chicago as a "Mid-America" urban gateway for Atlantic Ocean Region satellites. IRI claims that this earth station would meet a presently unfulfilled need for a low cost international satellite terminal in the Chicago area that is capable of satisfying user demand for diverse digital services. IRI also distinguishes its offerings from the "wholesale/retail" type of service proposed by Comsat in its Teleport Application.

24. The second IRI application (File No. CSG-84-004-P/L) requests authority to construct and operate a similar Standard E earth station in downtown Manhattan for use as an urban gateway in the Atlantic Ocean Region. IRI claims that its application is superior to Comsat's Teleport Application in that it not only serves users/customers directly, but it also alleviates the need for construction of expensive fiber optic connecting

[14] The application requests authority to construct and operate a Standard E station to be used in the urban gateway configuration as described in paragraph 21.

links. We grant both of these applications today conditioned on our ultimate policy determinations in this docket.

5. Authorized User Revisited (Authorized User II)

25. The international record carriers have requested in a number of proceedings that we adopt a more open earth station ownership policy and that we permit carriers some form of direct access to the INTELSAT space segment. In addition, the IRCs have argued that there is a nexus between these two policy proceedings and our completed *Authorized User Revisited* proceeding. It is averred by the IRCs that to maintain a competitive balance between Comsat and the IRCs these three policy inquiries should have been considered together. In *Authorized User Revisited* we determined that it would be in the public interest to permit Comsat to provide space segment capacity directly to users. We also indicated that the earth station ownership and direct access proceedings were separate and independent inquiries: that there was no necessity to consider all three issues simultaneously. The IRCs thereafter filed for court review of our *Authorized User Revisited* decision. On appeal, the court adopted the IRCs' nexus argument. It vacated and remanded the *Authorized User Revisited* decision on the grounds, *inter alia*, that we had abused our discretion by implementing a new authorized user policy prior to considering the merits of direct access and earth station ownership.[15] Our action today in this docket and in the direct access proceeding are therefore consistent with the court's directive.

II. *Discussion*

A. *Policy Overview*

26. We note as a threshold matter that the Commission under Section 201(c)(7) of the Communications Satellite Act of 1962 has the responsibility to establish an earth station ownership policy which best serves the public interest.[16] In carrying out this responsibility we believe that there will be significant benefits in liberalizing our current ownership policy. The existing policy was established in 1966 at a time when INTELSAT was barely operational, when satellite technology was in its infancy and when the driving policy consideration was the establishment of a global satellite system. In this environment it was reasonable to give Comsat a dominant role in any earth station ownership scheme. However, the successful evolution of INTELSAT from a fledgling entity managed by Comsat with only a handful of members to a mature and financially sound

[15] *Authorized User Policy*, 90 FCC 2d 1394 (1982), *vacated and remanded*, ITT World Communications Inc. v FCC and consolidated cases. Case No. 79-1046 *et al.* (D.C. Cir., January 13, 1984).

[16] 47 U.S.C. § 721(c)(7).

organization with over 100 members and its own management staff gives us the opportunity to advance from a necessarily conservative policy to a policy which stresses benefits to users while recognizing our commitment to INTELSAT. Moreover, recent changes in satellite and earth station technology have helped open the way for greater individual carrier participation in earth station ownership and operation. Finally, we believe that competition in the provision of earth station services would encourage innovation, promote efficiency and create a downward pressure on rates. Specifically, competition in the provision of earth station services enhances intramodal competition by permitting carriers other than Comsat to own and operate earth stations. Additionally, intermodal competition may be augmented by our proposed policy by permitting carriers to provide satellite services in a more efficient manner.

27. We therefore tentatively conclude that individual carrier ownership and operation of international earth stations which operate with the INTELSAT global communications satellite system would serve the public interest. We believe that such a policy would encourage carriers to build their own earth stations as marketplace forces dictate, thus providing users with additional choices while creating a downward pressure on earth station rates. In implementing such a policy we propose to permit competition consistent with statutory objectives for both existing and new stations, and would consider applications from any carrier. We shall permit the existing jointly owned international earth stations to continue to operate under the ESOC Agreement or under any other arrangement the joint owners may agree upon. Additionally, with a proper unbundling of the present Comsat tariffs, carriers will be able to obtain space segment capacity separate from earth station capacity for use in conjunction with their individually owned stations. While we recognize the need for a smooth transition from one ownership arrangement to another in order to prevent any disruption of service and to preserve the integrity of the INTELSAT system, we reject as unwarranted the three year moratorium period on applications that Comsat has proposed.

28. In opening up alternative ownership formats, we shall continue to employ our authorization process to assure that each proposed earth station will serve the public interest and that there will be no significant adverse impact on the INTELSAT system.[17] Below we discuss the legal, policy, technical, economic and other considerations which prompt us to tentatively conclude that a more competitive earth station ownership policy would serve the public interest.

[17] 47 U.S.C. §§ 214, 304, 308, 309, 319, and 721.

B. Legal Considerations

29. The Commission's authority over INTELSAT earth stations within the United States is found in Titles II and III of the Communications Act of 1934, as amended, and Titles I, II and III of the Communications Satellite Act of 1962, as amended. In particular, Section 201(c)(7) of the Communications Satellite Act directs the Commission to "grant appropriate authorization for the construction and operation of each satellite terminal station, either to the corporation [Comsat] or to one or more authorized carriers or to the corporation [Comsat] and one or more such carriers jointly, as will best serve the public interest, convenience, and necessity." In enacting this section, Congress expressed no preference on which ownership arrangement we should permit but gave us the discretion to determine the ownership scheme which would best serve the public interest.[18] Thus, we believe that we were given two responsibilities: (a) to use our expertise and discretion to establish an initial earth station ownership policy which served the public interest; and (b) to modify that policy as called for by changes in the facts and circumstances underlying the original formulation of the policy.[19]

C. Policy Considerations

30. The principal policy issue addressed by the parties in this proceeding is whether earth station capacity can and should be provided by any entity other than ESOC. Comsat and the other parties are polarized on this issue. Comsat argues that ESOC has established a technically efficient and cost effective network capable of growing to meet the needs of both large and small users and that this network should continue, albeit under a somewhat modified form of ownership under which Comsat acts as a "wholesale" service provider of the earth station facilities to carriers which, in turn, act as end-to-end "retail" service providers for their customers. Nonetheless, Comsat concedes that the Commission could consider applications from other carriers (after a transition period) and grant these applications if they meet a strict public interest standard. Other parties argue that a more flexible ownership and operational scheme for both new and existing stations would better serve

[18] Section 201 (c)(9) of the Satellite Act also directs us to ensure that no substantial additions are made to the U.S. earth station network unless required by the public interest.

[19] These changes would include advances in earth station technology, the feasibility of competition in the provision of earth station services and facilities, the impact of a proposed policy on INTELSAT, the quality and price of service to users, the development of intermodal and intramodal competition in the international marketplace, foreign policy and national security considerations, and interference, compatibility and connectivity requirements.

the needs of international satellite users without adversely affecting the efficiency of the INTELSAT global system.

31. After undertaking a thorough review of our earth station ownership policy and the comments in this proceeding we tentatively conclude that it is no longer necessary to mandate that international earth stations be owned jointly by COMSAT and the international service carriers. Rather, we believe that a more flexible ownership scheme which encourages intramodal competition would promote innovation, encourage system efficiency, establish more service choices for users, and create a downward pressure on costs and rates to the public. Under our proposed policy earth stations could continue to be owned by ESOC, by individual carriers, or by any combination of carriers with or without Comsat's participation. We particularly believe that the filing by Comsat of a cost-based, unbundled tariff - separate rates for earth station and space segment services - coupled with the opportunity for carriers to construct their own earth stations at locations of their choosing will promote the establishment of efficient networks and result in substantial savings for users. Although there remains a need for a smooth transition and for the weighing of public interest factors when considering specific applications in our authorization process, we believe that new forms of ownership for all types of earth stations which operate with the INTELSAT system would serve the public interest.[20]

D. Technical Considerations[21]

32. The NOI separated earth stations into four classes to assist interested parties in submitting comment on specific issues: (1) new general purpose; (2) existing general purpose; (3) new special purpose; and (4) existing special purpose. Upon review, we believe that these classes of stations were useful in describing the existing earth station arena but do not reflect the future earth station environment. For instance, Comsat's New York Teleport application has been characterized by some as a request to construct a new general purpose station and by others as a request to construct a new special purpose station. The same may very well be said for IRI's applications. To avoid trying to force such

[20] Since the Notice of Inquiry initiating this docket was released, INTELSAT has established the IBS offering which is aimed expressly at customers who could benefit from the use of smaller antennas on or near their premises. This service anticipates a large number of earth stations accessing a satellite. We are aware of no public interest reason to mandate that these new stations be owned by a single COMSAT/carrier consortium rather than by competing carrier offerors.

[21] No party has asserted technological impediments to the construction by a non-ESOC entity of earth stations to operate with the INTELSAT system. In fact, it is partly in recognition of state-of-the-art earth station and satellite technology that we tentatively conclude to establish a more open and flexible earth station ownership policy.

applications into one of these two previously recognized classes, we would substitute a more practical classification scheme based upon prevalent technology, i.e., IBS, television, and multi-purpose earth stations. We shall therefore employ these three earth station classes when addressing technical and other issues raised by the parties. We shall also use these categories in proposing application evaluation criteria.

33. The primary technical issue raised by the parties is whether a policy encouraging competition in the provision of U.S. earth station capacity will have significant adverse affects on the overall efficiency of the INTELSAT system. It is argued by COMSAT that as more antennas access a particular satellite (and that satellite's transponders) the overall efficiency of the satellite will decline. The result of such increased access by different earth stations may be that satellites will reach traffic saturation before they would have reached saturation under a more restricted access scheme. Once saturation occurs, all INTELSAT countries will have to fund earlier launches of new satellites and install additional multiplexing equipment.

34. Inefficient use of the space segment can arise from a number of sources. Certain modulation formats for multi-purpose earth stations work more efficiently with only one or two earth stations accessing a transponder than with multiple earth station access that one might expect in a competitive environment. Further, a competitive environment may tend to encourage the use of earth stations smaller than Standard A or Standard C stations (such as Standard B stations) for multi-purpose service. These smaller stations in some situations do not achieve the satellite efficiencies that could be achieved with the larger stations. INTELSAT does discourage overly wide use of small stations, such as the Standard B, for voice-grade service, by exacting a space segment surcharge for circuits transmitted from or received by these stations. Unfortunately, it is virtually impossible for us to make a general policy finding of the exact degree of inefficiency, if any, that might be generated by new earth stations, both large and small, in a competitive environment. It would depend on such factors as the type of modulation and multiple access used (*i.e.*, FDMA vs. TDMA) the frequency band (i.e., $^{6}/_{4}$ GHz vs. $^{14}/_{11}$ GHz), the ocean region (i.e., Atlantic vs. Pacific), the particular satellite (*i.e.*, Major Path or Primary), the particular transponder with its connectivity requirements (*i.e*, few vs. many countries), the type of communications (*i.e.*, analog vs. digital), and the size of the antennas on both the U.S. and foreign ends (*i.e.*, *ends* Standard A, Standard B, Standard C, or other).

35. We believe it best to examine these factors on a case-by-case basis when considering applications to construct and operate one of the three classes of earth stations rather than in a generalized policy context.

However, we note that for IBS and television earth station applications the issue of inefficiency is generally irrelevant. As to IBS earth stations, INTELSAT anticipates a multi-earth station service and has already evaluated considerations of satellite efficiency. It has arrived at space segment prices that compensate it for the full cost of space segment associated with each type of IBS earth station. We therefore will not give this argument substantial weight when considering applications to construct and operate station for IBS. As to television service earth stations, the number of television channels which can be derived from a transponder is generally independent of the number or size of earth stations accessing the transponder. Ordinarily, no more than two earth stations will access the same transponder. Thus, the operational nature of television service does not create a significant inefficiency issue. As to multi-purpose earth stations, which have in the past utilized mostly Standard A and Standard C antennas, the inefficiency concerns are real and must be considered. Yet, we believe that a reasonable addition of new multi-purpose U.S. earth stations may not result in a discernable change in achievable satellite efficiency from that obtainable under our present ownership policy. Thus, while the concern over inefficiency is real, in practical terms it does not appear to be relevant to our determination of IBS and television earth station applications, and in many instances may not be critical to our consideration of multi-purpose earth station applications. Moreover, advancements in both satellite and earth station technology - such as the further development of multiplexing equipment like TDMA - will enhance the efficiency of multi-purpose earth stations and the INTELSAT system.

36. Further, balanced against the potential inefficiencies in space segment usage under the situations discussed above are the benefits of increased user choice and lower rates that could be provided by allowing multiple carriers to offer competitively priced stations which can be located near or at a customer's premises. Through use of these stations a customers can reduce the expense, inconvenience and technical problems associated with the terrestrial transmission to more distant earth stations. These benefits similarly apply to carriers who are able to locate earth stations closer to their switching centers and, therefore, use these stations to provide more reliable and lower priced service to their customers. We particularly emphasize here the potential savings in reducing the length of the terrestrial hauls to distant earth stations.

E. Economic Considerations

37. Economic issues raised by the parties relate to the costs and benefits of independent ownership both to participants in the INTELSAT system (i.e., Signatories and international carriers) and to users of the INTELSAT system. These include the integration of U.S. earth station

planning with the planning of INTELSAT satellite resources, additional costs for foreign administrations, and revenue diversion.

1. Integration

38. We recognize that the operations of U.S. earth stations must be integrated into the INTELSAT system and that the obligations of the United States to install new earth station equipment as scheduled by INTELSAT must be met. We believe that the earth station owners should, in the first instance, be given the opportunity to resolve these issues themselves. However, because of the importance of these issues we believe that retaining jurisdiction over the U.S. earth stations plus conditioning earth station authorizations as necessary would remedy any integration or coordination problem. For example, an issue may arise when INTELSAT, with input from the United States, decides that certain traffic from certain countries should be handled by special modulation formats (such as TDMA). As an operational policy INTELSAT does not decide which earth stations in a given country should change their formats to meet these requirements. It allows the country to make this decision. With competitive stations, there may arise disagreement among the owners concerning who should incur the extra investment. If this situation occurs, we believe the earth station owners could resolve the matter through negotiations. Subsequently, and only if necessary, the matter would be resolved by the Commission through its retained jurisdiction and conditioned authorizations.

2. PTT Economic Concerns

39. Comsat argues that our foreign partners will be adversely affected by a major policy change since overseas earth stations would need additional equipment to operate with new U.S. earth stations. Such equipment would increase the costs to our foreign correspondents and provide an economic incentive for these administrations not to enter into operating agreements with new U.S. earth station operators. We cannot disagree with Comsat on this point. However, we would make three points. First, the expenditure of additional funds and/or the interconnection with new entrants continue to be decisions to be made by our foreign partners just as they are today. Thus, operation of any new U. S. earth station would require, as an operational matter, a willing foreign partner.[22] Second, because of our proposed policy, foreign administrations, in order to increase their revenues, may show a greater willingness to enter into operating agreements with U.S. carriers which have distinct customer bases and their own earth stations. And third, new entrants and increased competition in the United States should increase demand for all

[22] This decision is wholly within the sovereign prerogative of the foreign administration.

INTELSAT services, assuming demand price elasticity, and thus increase revenues for both INTELSAT and its members.

3. Traffic and Revenue Diversion

40. Comsat argues that traffic diversion from existing ESOC earth stations will have a severe economic impact on the owners of existing earth stations. In particular, Comsat argues that some international carriers (particularly AT&T) would likely divert significant amounts of traffic from the existing ESOC stations to new earth stations. This diversion, according to Comsat, would substantially reduce revenues and cause rates to rise for the remaining carriers (and users) of these earth stations. Therefore, Comsat believes it would be more costly overall to accommodate future traffic increases through new earth stations than through existing ESOC stations (when possible). On the other hand, several potential owners of new earth stations argue that any traffic diversion would generally be offset by increases in international satellite traffic.

41. The IRCs and AT&T are the ESOC members which originate and terminate traffic. They provide end-to-end service to users in contrast to Comsat which, at present, merely serves these carriers. As to the IRCs, they generate relatively little international satellite traffic and own relatively small shares of the ESOC earth stations. In the most important consortium, the four earth stations located in the continental United States, the IRCs generate approximately 10 percent of the traffic and own about 15 percent of the facilities. Since satellite traffic handled by U.S. earth stations is estimated by INTELSAT to grow in the next several years at an annual rate of about 16 percent, any diversion of traffic by one or more IRCs to new earth stations is likely to be offset by overall market growth, thus avoiding any economic harm to Comsat, other ESOC members or the public.[23] However, the same is not necessarily true for traffic originated by AT&T. Clearly, if AT&T were to divert a substantial percentage of its traffic to a new facility, Comsat would suffer a revenue loss and the joint owners, including AT&T, would suffer a rental payment decrease. Yet, we are not convinced that some traffic diversion would necessarily be undesirable. We recognize that traffic diversion may be an inevitable consequence of the independent ownership of international earth stations and the competitive provision of international earth station services. As a general matter, we believe that some diversion would not unduly harm Comsat and should not dissuade us from pursuing a competitive policy. To accord Comsat blanket protection against all diversion would deprive the public of the benefits of new and efficient

[23] We also note that Comsat's operating revenues increased by 24.4% in 1979, 14.13% in 1980, 11.44% in 1981, and 22.6% in 1982. Source: FCC Monthly Report 901.

service offerings which we foresee resulting from the competitive ownership and operation of international earth stations. Presumably, if AT&T's current costs of obtaining earth station capacity exceed its costs under a scenario where it builds and operates one or more earth station facilities, then independent (or at least non-ESOC) ownership of earth stations by AT&T could lead to a more efficient service offering and lower rates to users. However, before making final conclusions on this point we seek comment on the issue of what weight should properly be given to potential traffic diversion from existing ESOC earth stations to new earth stations. Should we treat such diversion as a natural and benign consequence of the market mechanism or should we attempt to balance the interests of the current providers of earth station capacity with the interests of consumers likely to benefit from more efficient entrants? We would anticipate considering in the application process, on a case-by-case basis, questions of economic harm and impact on other carriers.[24]

F. Other Issues and Future Market Structure Characteristics

42. We now turn to a number of issues relating to the transition to a new ownership policy and the basic structure of the proposed earth station ownership environment. These issues include the disposition of the ESOC earth station assets, expanded participation by U.S. earth station operators in our INTELSAT instructional process, the unbundling of Comsat's existing tariff into separate earth station and space segment rates, the necessity of any moratorium period, general criteria that we will utilize in considering applications to construct and operate new earth stations, and the structural separation of Comsat's monopoly space segment services and competitive earth station services.

1. Disposition of Existing ESOC Earth Station Investments.

43. Almost all the parties commented on whether the existing joint ownership arrangement should be preserved, whether an independent ownership arrangement should be established, or whether a hybrid ownership arrangement should be fashioned. Several parties advocated the dissolution of ESOC, preferably by means of voluntary agreement among the ESOC partners. Others voiced no objection to the continuation of the ESOC arrangement for existing stations but recommended that the Commission permit new stations to be constructed independently of ESOC. Some parties took yet another position of wanting to continue and ESOC-like arrangement (i.e., ownership proportional to use), but with the

[24] In addition to the issue of traffic and revenue diversion, we solicit comment on whether AT&T's unique position in the international arena as the major source of traffic and the major owner of cable facilities should be considered (and if so, how) when formulating our general earth station ownership policy and evaluating specific earth station applications.

removal of Comsat's monopoly-based World Systems Division as a guaranteed 50 percent owner. This third group would permit Comsat to enter the competitive earth station market only through a separate subsidiary and to participate in any ESOC-like arrangement based on its proportionate use of the facilities as an end-to-end service provider.

44. In considering this important issue, we emphasize that any solution must assure the continued provision of service to users at reasonable rates. Certainly, retaining the ESOC arrangement for one or more of the existing earth stations is a possible alternative. This would not preclude us from authorizing new earth stations. Also possible are a full dissolution with a sale/transfer of the ESOC assets to one or more carriers or any combination of these two solutions. We tentatively conclude that the ESOC partners should be given the opportunity to negotiate the future of ESOC.[25] These negotiations would be initiated after the release of our Report and Order and continue for several months. At the end of this period an agreement to retain or dissolve all or part of ESOC would be presented to the Commission for public comment and approval. Absent such an agreement by the ESOC partners, we would then consider at the end of the negotiating period individual proposals regarding the future of the ESOC investment.[26] While we have tentatively concluded to permit the joint owners to negotiate the future of ESOC, we solicit comment on the merits of permitting carrier negotiations, on the period of time for negotiations, the framework for the negotiations and the alternative option of going immediately to a prescription without negotiations.

2. INTELSAT Representation.

45. The primary representational issue is whether a policy encouraging competition in the provision of earth station capacity will create problems in the effective coordination and presentation of U.S. policy interests within INTELSAT. As distinct from earth station integration as described in paragraph 38, which relates to the operation and technical coordination of U.S. earth stations with the INTELSAT system, this issue deals with U.S. input into INTELSAT policy, tariff and procurement decisions. At present, in accordance with the INTELSAT Agreements,

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[25] In considering any disposition of the existing ESOC ownership arrangements, parties should note that the Commission's rules address the accounting treatment of the transfer or sale of these assets among carriers from both the transferor/seller and transferee/buyer perspective. Ratemaking implications of such proposed transactions will be addressed in appropriate future proceedings, as necessary.

[26] Of course, the joint owners could initiate discussions after the release of this NPRM and we would encourage them to do so. We expect that any arrangement negotiated now to be consistent with our structural requirements proposed here and required in our *Comsat Structure* orders.

Comsat is the U.S. Signatory to INTELSAT and represents the United States at INTELSAT meetings. Comsat's actions within INTELSAT are subject to our instructional process by which NTIA, the Department of State and the Commission develop U.S. positions on various issues. Under a competitive policy, different earth stations would be owned by different entities, yet would still be considered by INTELSAT to be U.S. operated earth stations. The question arises as to what role the U.S. earth station community should have in the instructional process and ultimately in INTELSAT.

46. A number of possibilities have been suggested by the parties. At one end, each entity owning one or more earth stations might attend certain INTELSAT meetings. At the opposite end, only Comsat's World Systems Division (as Signatory) would attend as agent for all of the U.S. owners. Another possibility that has been proposed is the creation of a carrier committee to attempt to coordinate positions and participate, to the extent possible, in the instructional process and INTELSAT meetings.

47. We have considered the various possibilities and tentatively conclude that Comsat, the U.S. Signatory to INTELSAT under the INTELSAT Agreement, is in the best position to continue to represent the United States at INTELSAT meetings. Comsat is the only U.S. entity responsible for planning and investing in space segment and is therefore the logical choice for this role. We further believe that Comsat, through the instructional process, will continue to adequately represent U.S. interests. While we have no reason to believe that Comsat will not fulfill its representational role in the proper manner, we will monitor Comsat's role to assure that it acts in a manner consistent with its mission.

48. Although we believe Comsat should act as the spokesman for U.S. earth station owners at INTELSAT meetings, we also believe that carrier input on selected issues into the instructional process would be beneficial. While we seek to establish a mechanism for greater carrier and earth station operator participation, we will not permit a situation to develop that would be disruptive to the achievement of a cohesive U.S. role in INTELSAT. We invite comments on the establishment of a satisfactory mechanism.

3. Unbundling.

49. Under the current ownership and operational arrangement, Comsat offers earth station and space segment services under a bundled tariff to the international service providers. The other ESOC members, AT&T and the IRCs, tariff end-to-end services for their own customers. These latter rates necessarily include Comsat's charges for earth station and space segment facilities. Under our proposed policy, carriers would no longer be required to take service from an ESOC (or Comsat) earth station

but could apply for authority to construct and operate their own earth stations. They would turn to Comsat for the provision of space segment service only. Therefore, it is imperative that Comsat file tariffs offering space segment only services for use by carriers owning their own earth stations. The unbundling by Comsat of space segment and earth segment charges is a necessary and logical requirement to make competition feasible in the provision of earth station facilities. In its comments to this NPRM, Comsat should describe how it would unbundle its existing tariffs and submit sample tariffs which are consistent with our *Second Comsat Structure* order with rates and an explanation of the methodology employed. Comsat should clearly identify and explain all expenses and capital costs wholly associated with space segment and earth station services. In addition, Comsat should clearly identify and describe costs of all activities common to earth station, space segment, and other services. These latter costs should be apportioned in a reasonable manner among all services.

4. Moratorium on Authorization of New Stations.

50. Comsat has argued in its "wholesale/retail" combination earth station proposal that we should adopt a lengthy transition period before we permit competition. The first part of this period would involve negotiations necessary for the dissolution of ESOC and the establishment of the combination earth station operations. The second part would be a baseline period during which Comsat would develop and offer a range of services to carriers only. During this transition period, which Comsat suggests may take up to three years, Comsat requests that we forebear completely from accepting applications for multi-purpose and television earth stations.[27]

51. All other parties commenting on the future market structure reject such a moratorium as unnecessary and anti-competitive. While some transition period might be necessary for multi-purpose earth stations, we view Comsat's lengthy moratorium proposal as unwarranted and not in the public interest. We request further comments on this issue.

5. Application Criteria.

52. We believe that all relevant public interest factors should be considered, as they are now, under Parts 63 and 25 of our Rules, in deciding whether to authorize the construction and operation of new stations and in determining the future operation of existing stations. We

[27] Comsat would permit early applications for certain special purpose stations which meet its "regulatory criteria" including the requirement that the station be self-sustaining and that it be used to provide a single telecommunications service to a single carrier that could not be provided by a general purpose station.

intend to consider all applications on a case-by-case basis and will not limit our review of an application to merely technical/interference issues. However, as indicated in paragraphs 31 through 35 on earth station efficiency, we do believe that the relevant factors can differ with respect to different classes of earth stations. We shall, therefore, discuss the factors we shall consider in formulating specific ownership and operational policies for the IBS, television and multi-purpose classes of earth stations.

53. IBS is a flexible, totally digital integrated service designed to accommodate a full range of user applications including telex, voice, facsimile, data and teleconferencing. INTELSAT has planned the space segment capacity for IBS, unlike its standard capacity, to enable a single transponder to accommodate access by a large number of earth stations, including those with small and medium sized antennas. The IBS capacity is further designed to accommodate user networks through a variety of connectivity arrangements. Comsat has stated in this proceeding that the characteristics of the space segment that INTELSAT plans to have available for IBS purposes are such that they do not give rise to the same concerns that Comsat has with respect to independent ownership of multi-purpose stations. Thus, since the multiple access concept is an integral part of the IBS concept, we need not consider the effect of multiple IBS earth stations on established INTELSAT services. However, since INTELSAT has been developing performance characteristics for earth stations to operate with satellites providing business services, any application for such specialized earth stations would have to conform to those standards.

54. Comsat states in its comment to the application (File No. CGS-84-011-P/L) of International Relay, Inc. that the space segment resources that INTELSAT has now committed for IBS should be more than sufficient to accommodate the demand for reasonable use through the end of the decade. However, Comsat is concerned that authorization of an inordinate number of IBS stations in a few markets or geographic areas may inhibit efficient use of IBS capacity to effectively serve all areas of the U.S. Comsat therefore believes that a "structured framework" must be established for the authorization of IBS stations. However, we do not see the need at this time for a "structured framework" which would place limitations on who should be authorized IBS stations and where they should operate. We believe that U.S. use of IBS capacity should be determined by the actual need for IBS service as evidenced by applications that we may receive and not by some predetermined or otherwise restrictive plan. We will, of course, consider any specific proposal that Comsat may wish to present in this proceeding or in response to specific applications. However, we believe that any such proposal should be based

on planning for adequate IBS space segment to meet U.S. competitive needs.[28]

55. Television service, like IBS, is a specialized offering distinct from INTELSAT's general offering of space segment capacity. This service is a relatively minor source of revenues for INTELSAT. It is provided by a small number of specific satellite transponders which can be accessed by only a limited number (ordinarily two) of earth stations per transponder at a given time. As with IBS, we do not view issues of inefficiency, or revenue diversion to be particularly critical for consideration of television service earth station applications. System inefficiency would not occur since no greater number of earth stations would access technically a particular transponder even under a more liberal ownership policy. Revenue diversion for such a limited service offering cannot be considered substantial as it accounts for only a small percentage (less than 4 percent) of Comsat's current revenues and is now provided, in part, through special purpose earth stations such as Comsat's Santa Paula facility. We therefore intend to process television and IBS applications in a similar manner. Multi-purpose earth stations will continue to be closely scrutinized since they raise more complex economic and operational issues and clearly impact other carriers.[29]

56. Accordingly, we need not consider the full panoply of issues in reviewing applications for IBS and television earth stations that we will have to consider in reviewing applications for multi-purpose stations. In reviewing applications for IBS and television earth stations, we will consider the minimal legal (citizenship and character), financial (ability to meet the costs of construction and operation), and technical (station location, desired frequencies and types of equipment to be used, hours and mode of operation, etc.) qualifications of the applicant as required by Sections 308 and 319 of the Communications Act.[30] In addition, the Commission will monitor frequency coordination[31] and engage in proce-

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[28] Comsat's application for an IBS earth station in New York City and IRI's two applications for IBS earth stations in New York City and Skokie, Illinois are consistent with our proposed policy and application criteria. Further, these applications are consistent with INTELSAT's technical standards. Because of the public benefits of initiating IBS as soon as possible, we grant in two companion orders the Comsat and IRI applications. These grants of authority are, however, conditioned on the outcome of this rulemaking proceeding.

[29] *See* FCC vs. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Company, 28 FCC 231 (1960).

[30] For applications by U.S. carriers to provide future services offered by INTELSAT we believe that a generic approach based on our treatment of IBS/TV and multi-purpose earth stations would be appropriate. Thus, depending on the space segment utilized, we would routinely process or fully review the applications on a case-by-case basis.

[31] We view the resolution of interference problems as an important part of all earth station application proceedings.

dures to implement the National Environmental Policy Act of 1969, 42 U.S.C. 4321-4347, as may be necessary. Applicants should file FCC Forms 401 (Application for New or Modified Common Carrier Radio Station Construction Permit) and 430 (Common Carrier and Satellite Licensee Qualification Report) in addition to a Section 214 application under Section 63.01 of the Commission's Rules. Upon acceptance for filing, the applications will be placed on 30 days public notice pursuant to Section 309 of the Act and Section 63.52 of the rules. Absent special problems, the Commission will treat these applications as routine and will seek to expeditiously process them. Upon grant, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While we will limit the use of the facilities authorized for the provision of IBS or television services to these services, carriers may seek additional authorization if they desire to use these facilities as multi-purpose earth stations. Additionally, Section 201 (c)(2) of the Communications Satellite Act requires authorized carriers to have nondiscriminatory use of and equitable access to the communications satellite system and satellite earth stations owned by other carriers.

6. Structural Modifications.

57. Several parties have commented on the issue of the appropriate structural form for Comsat's participation in the competitive ownership and operation of earth stations. The particular question is whether Comsat's ownership and operation of INTELSAT stations should be in the parent company (i.e. World Systems Division) or in a separate carrier subsidiary providing non-monopoly service. Comsat argues in its comments that earth station ownership must be within the parent World Systems Division rather than within a competitive subsidiary. Comsat contends that as a matter of law the parent is the "corporation" as referenced in Section 201(c)(7) of the Communications Satellite Act.[32] Other parties have argued, however, that the term "corporation" includes the competitive subsidiaries of Comsat. We tentatively adopt the latter view. This view is consistent with our determination in the *Comsat Study,* the *First Comsat Structure* order and the *Second Comsat Structure* order that most activities other than the provision of INTELSAT, capacity should be performed outside of the World System Division.[33]

58. The structural separation of Comsat's competitive earth station activities from its monopoly space segment activities will minimize cross-

[32] Section 201(c)(7) of the Communications Satellite Act directs the Commission to grant appropriate authorization for the construction and operation of earth stations to the corporation (Comsat), to authorized carrier(s), or to both jointly.

[33] See Comsat Study, 77 FCC 2d 564 (1980) and Communications Satellite Corporation (Comsat Structure), 90 FCC 2d 1159 (1982).

subsidization between the emerging competitive entity for earth station services and the monopoly WSD for space segment services. It will also insulate Comsat's monopoly rate base, provide for separate accounting treatment for the monopoly services, assure arms-length dealings between the competitive subsidiary and the WSD, and help prevent improper transfers of information.

59. Therefore, we tentatively conclude that all Comsat applications for new stations or for additions to existing stations should be made through a Comsat subsidiary. We also propose that Comsat be required to transfer any ownership interests in existing INTELSAT stations from its World Systems Division, which provides monopoly space services, to a separate subsidiary, which will provide competitive earth segment services. Such a transfer would be submitted to the Commission for review.

III. Summary of Tentative Cconclusions

60. *Flexibility in Authorization for New Stations.* We have tentatively concluded that the adoption of a more open and flexible earth station ownership policy which relies on marketplace forces is consistent with the Communications Act of 1934 and the Communications Satellite Act of 1962. Carrier owned and operated earth stations are technically feasible, create no major economic hurdles, will not adversely affect our foreign partners in INTELSAT, and will result in lower cost and technically superior service to consumers. We are also confident that a smooth transition to this new environment can be achieved so as not to jeopardize service to users or carrier investments. Thus, we would, consistent with our authority under the Communications Satellite Act and INTELSAT commitments, permit any international carrier or group of carriers to apply for authority to construct and operate such stations, be they IBS, television, or multi-purpose types. To facilitate this policy, Comsat would be required to file cost-based tariffs for INTELSAT space segment usage. Consistent with our *Comsat Structure* orders, Comsat would file space segment tariffs through its World Systems Division and earth station tariffs through a subsidiary acting as an international carrier. Finally, we believe that a moratorium on accepting applications is not in the public interest.

61. *Authorization Criteria for New Earth Stations.* We also tentatively conclude that all relevant technical, economic, operational, and global system considerations should be addressed in our determination of whether to authorize a particular multi-purpose application. We have discussed certain factors we believe will usually be relevant for multi-purpose stations, and have requested comment on the possible relevancy of other factors, such as diversion of traffic among stations and AT&T's unique position in the international market. With respect to IBS and TV stations it is clear that space segment efficiency and diversion of traffic

from multi-purpose to IBS and television stations are not significant issues.

62. *Flexibility in Determining the Disposition of ESOC Investment.* We tentatively conclude that as to existing stations it is not necessary for us to prohibit continuation of the ESOC ownership arrangement. We believe such an arrangement could be part of the choice available to carriers and users in the emerging competitive environment. Nevertheless, it is possible that the ESOC owners may desire to change the current ownership arrangements. Therefore, we propose to give the owners of existing earth stations an opportunity to determine the future of ESOC. Absent a unanimous agreement of the owners to retain, modify or dissolve ESOC after a period of negotiations, perhaps three or four months, any individual owner who seeks a change would be able to propose its own plan and we would then take appropriate action.

IV. Ordering Clauses

63. Accordingly, in view of all the above, IT IS ORDERED, pursuant to Sections 1,4, 201-205, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 201-05 and 403, and Titles 1 through 4 of the Communications Satellite Act of 1962, as amended, 47 U.S.C. Sections 701-44, and 5 U.S.C. Section 553, that a rulemaking proceeding is HEREBY COMMENCED into the above described matters.

64. IT IS FURTHER ORDERED, that pursuant to applicable procedures set forth in 1.410 and 1.415 of the Commission's Rules, interested parties may file comments on or before June 22, 1984, and reply comments on or before July 16, 1984. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding, participants must file an original and five copies of all comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

65. IT IS FURTHER ORDERED, that for purposes of this nonrestricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a

person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's rules, 47 C.F.R. 1.1231.

66. Pursuant to Section 605(b) of the Regulatory Flexibility Act (P.L. 96-354) IT IS CERTIFIED, that Sections 603 and 604 of the Act do not apply because this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. See 5 U.S.C. §§603, 604, 605(b). We do not anticipate that a substantial number of carriers will enter the earth station market. Further, we do not believe that very many of these entrants will be small entities.

67. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this order to be published in the Federal Register and shall mail a copy of this NPRM to the Chief for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A
COMMENTS AND REPLIES TO NOTICE OF INQUIRY

1. Western Union (WU). Western Union states that an expanded ownership policy is necessary to offset competitive advantages granted to Comsat by the *Authorized User Revisited* decision, 90 FCC 2d 1394 (1982). Carrier choice, WU argues, will promote greater efficiency, lower prices, and opportunities for technological innovation. WU does not distinguish between special purpose and general purpose stations nor does it discuss the future of the ESOC arrangement. WU recognizes that multiple earth stations may sacrifice some efficiency but states that the cost of service is also dependent on many other factors. One such factor is the reduction in costs of terrestrial lines that would be present with additional stations in the network. A second factor is the ability of carriers to offer tailor-made services with independent stations. WU asserts that such services would attract customers currently unable to use satellite communications.

2. National Public Radio (NPR). NPR wants maximum choice of carriers and services. NPR asserts that the more flexibility it has to send and receive international transmissions via

a multiplicity of carriers, satellites, and earth stations, the better it can serve its listening public. However, NPR also wants high-quality, cost-efficient service. NPR states it is not in a position to assess whether the changes proposed by some parties would ultimately make it easier and less costly for NPR to meet its unique requirements. Instead, NPR suggests that it is the Commission's responsibility to ensure that any changes in ownership do not have adverse affects on the availability, quality, and cost of service to end users.

3. RCA American Communications and RCA Global Communications, Inc. (referred to jointly as RCA). RCA contends that a policy permitting independent ownership of earth stations, particularly special purpose ones, is supported by technical, economic, legal, and operational considerations. RCA maintains that allowing diverse ownership would encourage technological innovation and efficiency in the operation of the stations. Price competition would then follow. RCA believes that such a policy is necessary to promote fair competition following the *Authorized User Revisited* decision, which permits Comsat to provide satellite capacity directly to users.

RCA believes that the Commission should apply only technical criteria in authorizing new international stations. Issues concerning potential economic impact on existing carriers and possible duplication of facilities would not be relevant in RCA's view.

RCA does not advocate abolishing the current ESOC general purpose network. Instead, it sees this as a benchmark for users to compare on a cost/benefit basis with new special purpose stations.

RCA states that additional earth stations (even Standard B's) will not result in a significant loss of satellite efficiency and revenues to INTELSAT. It reasons that such a loss would occur only in the current Frequency Division Multiple Access (FDMA-FM) mode of operation and not for amplitude modulated single side band (AM SSB) mode of operation, which RCA expects will be used internationally in the near future. In addition, RCA states that television transmission is not subject to inefficiencies created by multiple stations even with the present mode of access. Further, RCA maintains that INTELSAT's surcharge fully compensates it for all efficiency losses due to Standard B earth station operation.

As to the coordination of independent earth stations, RCA contends that it is extremely unlikely that any lack of unanimity among U.S. owners of stations would interfere with effective coordination between the U.S. and foreign owners of INTELSAT earth stations. In the event that such a problem occurs, the Commission has the authority to issue rules to insure proper coordination, maintains RCA.

4. Hawaiian Telephone Company (HTC). HTC supports several modifications to the Commission's ESOC policy. With regard to general purpose stations, it would allow the existing ESOC arrangement to continue but it would also allow other carriers to apply to the Commission for authority to jointly own and operate these stations. With regard to special purpose stations, it would favor individual carrier ownership. In both cases, applications for the construction of such stations would continue to be subject to the public interest, convenience and necessity standard. Therefore, the Commission could and should prevent technical, operational and economic harm to the INTELSAT system.

As to technical feasibility, HTC argues that Time Division Multiple Access (TDMA) operation will allow additional stations to be placed into the system. HTC also believes that the INTELSAT surcharge is an appropriate mechanism for handling the inefficiency caused by Standard B stations. HTC recognizes that additional stations may require some greater coordination than is presently the case. However, this burden is outweighed in its opinion by certain benefits in operational flexibility and efficiency, such as improved performance, greater physical reliability and the higher degree of security inherent in stations located near

customers' premises. Coordination would continue to operate with Comsat acting as the U.S. representative to the global system. The Commission would act to prevent anti-competitive behavior.

HTC recognizes the need for unbundled tariffs in a competitive earth station market. Therefore, it asks the Commission to require Comsat to unbundle its earth and space segment tariffs.

HTC supports continuation of rate averaging policies for those general purpose earth stations owned by ESOC. It argues that such averaging helps provide worldwide service at reasonable rates, especially to many lesser-developed countries that might otherwise not have adequate communications services.

5. American Telephone and Telegraph (AT&T). AT&T argues that changes in the marketplace and in the roles of the participants therein indicate that a change in the present ownership policy for both general purpose and special purpose stations is warranted. AT&T advocates independent carrier ownership. AT&T believes that carrier ownership of earth stations will not impinge on the technical, operational, or economic viability of INTELSAT and is in the public interest. AT&T states that carrier ownership of earth stations will obviate the need for ESOC. Therefore, AT&T advocates that ESOC owners should be permitted to devise a plan, subject to Commission approval, which will phase out ESOC.

AT&T reasons that competition between carriers will foster the use of state-of-the-art transmission techniques for multiple earth station/space segment access. Competition will also stimulate additional services and expand the satellite communications market.

AT&T states that independent ownership will not result in unfettered authority of the carriers to construct stations. Instead, the Commission would prevent uncontrolled proliferation through its granting of applications on a strict public interest standard.

As to technical efficiency consideration, AT&T agrees that FDMA-FM modulation is subject to degradation from multiple earth station access, but suggests that INTELSAT should use other modulation techniques including Companded Single Side Band (CSSB) and Time Division Multiple Access (TDMA). As to interference considerations, AT&T states that existing INTELSAT mechanisms are adequate to handle this kind of problem.

AT&T recognizes that permitting additional earth station owners will increase the difficulty of overall coordination. It proposes that Comsat continue to act as agent for all United States earth station owners in order to provide a focal point in the INTELSAT planning and coordination process. As a condition to granting a license to construct, own, and operate an earth station, earth station owners would be required to submit appropriate technical and traffic information to Comsat. AT&T states that Comsat's role as the unified voice for independent earth station owners would be quasi-managerial (as it is currently). These independent owners would compensate Comsat for its services as their agent.

On another topic, AT&T desires that INTELSAT and Comsat lease satellite capacity on a full transponder or partial transponder basis, rather than on only a per-channel basis. A transponder lease approach would encourage carriers to maximize efficiency, claims AT&T.

6. American Petroleum Institute (API). API is in favor of a competitive environment for the provision of earth station services, especially for stations located on customer premises. API states that if the Commission finds that there are no overriding technical or economic reasons why carriers cannot own and operate special purpose earth stations, the Commission should allow such ownership. API also urges the Commission to consider private ownership of earth stations should it be authorized to do so by Congress.

7. ABC, CBS, and NBC (The Networks). The Networks, as users of the INTELSAT system, argue that greater competition in the provision of international communications should be encouraged, to the extent it is technically, operationally, and economically feasible as well as consistent with considerations of international comity. Such competition would provide price and/or service improvements for users.

8. American Satellite Company (ASC). ASC favors carrier ownership of both general and special purpose stations albeit under the oversight of Comsat. ASC argues that advances in satellite technology now permit many entities to own and operate earth stations without technological or operational problems. Multiple ownership, argues ASC, would increase competition and result in a greater variety of services at a lower cost. ASC contends that adoption of such a policy does not mean that the Commission would authorize every application without regard to potential problems presented by the station. Instead, the Commission would make a case by case determination as to whether the particular earth station proposed serves the public interest. In making this determination, the Commission would take into account possible adverse economic and technical impact of that earth station on all other earth station owners, telecommunications entities, and carriers within the INTELSAT system.

To minimize the impact on INTELSAT of operational problems created by such a change in policy, ASC advocates that the Commission give Comsat limited supervisory powers over all U.S. earth stations. Comsat would also act as the U.S. representative to the INTELSAT system planning and coordination process. However, to ensure that Comsat does not abuse these roles, ASC sees the need for strict Commission oversight.

ASC voices thoughts on the economic impact of such policy on both INTELSAT and Comsat. As to INTELSAT, ASC claims that even if technical or operational inefficiencies and additional costs result from competitive earth station ownership, these costs will be offset by increases in revenues resulting from increases in traffic. Similarly as to the possibility of increased costs for Comsat's ratepayers because of diversion of traffic from ESOC stations, ASC states that it is more likely that international traffic will increase with the advent of competition and this increase will offset the traffic lost by Comsat. In any event, ASC states that the possibility of economic harm to Comsat or ESOC as a result of construction of new and independent earth stations is an issue that the Commission should consider before authorizing the new earth stations.

9. Western Union International (WUI). WUI argues that, because of our *Authorized User Revisited* and *Comsat Structure* orders, Comsat is no longer neutral and dedicated to the success of INTELSAT and ESOC. WUI concludes that Comsat can no longer fulfill the fiduciary role of manager of the earth stations representing carriers with whom it competes. Further, WUI argues that many carriers now have the expertise to own and operate their own stations.

WUI argues that there would be an unlawful preference for Comsat under the Satellite Act if Comsat were to continue to own and operate existing and future stations. WUI instead wants wide diversification of ownership. Further, WUI states that the public interest would not be served if a single carrier, such as AT&T, were substituted for Comsat as the dominant earth station entity.

WUI believes that Comsat has overbuilt and overspent in its ESOC role. It believes this situation can be remedied by extending competition in all types of earth stations. WUI sees no useful purpose in applying the general/special purpose dichotomy, except in the following sense. As to existing general purpose stations, WUI wants the Commission to require the ESOC members to negotiate a dissolution of the consortium and a reassignment of those stations owned by the consortium. Future U.S. INTELSAT stations would be independently

licensed on a case-by-case basis, subject to the new regulatory policies to be formulated in this docket. Further, WUI advocates that carriers be given the option to either lease earth station capacity or acquire such capacity on an indefeasible right of use (IRU) basis from other carriers.

As to the operational aspects of such a policy, WUI believes that independently owned U.S. earth stations will be compatible with INTELSAT's operations and organization. WUI cites the high number of earth stations in the Western Europe Region. WUI argues that each member nation is entitled to an earth station ownership policy in conformity with its political, social, economic and geographical needs. WUI argues that most nations have a single INTELSAT earth station operator only because they have a single international telecommunications entity. WUI believes that since the U.S. has multiple, competitive, international telecommunications entities, it is entitled to multiple INTELSAT earth station operators.

WUI has a specific proposal for coordination of independent stations. WUI suggests that independent U.S. earth station operators be included as Operation Representatives in regional planning sessions. In addition, WUI desires carrier participation in INTELSAT Planning Committee meetings. If participation is not possible, WUI advocates that carriers attend these meetings as observers.

As to technical aspects of such a policy, WUI avers that there are self-executing restraints against inefficient satellite utilization by U.S. earth station operators. These restraints are a keenly competitive environment for carrier services, prevention by the Commission of uncontrolled proliferation, the need for INTELSAT approval, and the need for agreement of foreign earth station operators.

As to economic factors, WUI argues that cost savings will result from a procompetitive ownership policy. WUI reasons that carriers will reap large savings in terrestrial charges through stations located near their operating centers or their customers' premises. Second, WUI claims that competitively stimulated innovations are likely to produce increased satellite demand and lower unit costs, without necessarily resulting in a net loss of traffic to the existing ESOC stations. Third, WUI believes that non-Comsat managed stations will not have to absorb Comsat's corporate overhead expenses and Comsat's research and development costs.

WUI addresses some additional issues. It argues that earth station rates should not be averaged pursuant to regulatory fiat. Instead, marketplace forces should play a role through carrier-initiated rates. It also claims that Comsat's participation in earth station ownership (both general and special purpose) should be through an arm's length subsidiary and not through its World Systems Division. Finally, it avers that if ESOC is retained, Comsat's preferential position of 50 percent ownership should be abolished.

10. TRT Telecommunications Corporation (TRT). TRT argues that the logic of the *Authorized User Revisited* decision mandates that carriers be permitted to own and operate INTELSAT earth stations individually. Otherwise, TRT avers, Comsat will be able to use its INTELSAT monopoly to gain an insurmountable and unfair advantage in the competitive international "retail" market contrary to anti-trust laws.

TRT maintains that allowing the international record carriers (IRCs) to own and to participate in the operation of earth stations to the extent of their use of international satellite circuits will improve the quality of service with no significant adverse effect on the efficiency of the INTELSAT system. TRT reasons as follows. First, TRT maintains that the number and types of earth stations located overseas has increased extensively over the years. Nonetheless, TRT avers, all technical problems associated with these stations have been resolved by INTELSAT. Second, TRT believes that because international communications is growing at a

healthy rate, it cannot be expected that the relatively small earth station capacity which the IRCs may wish to install will seriously offload existing U.S. earth stations. Additionally, TRT believes that if ownership interests in the existing U.S. earth stations are held by all carriers in proportion to their use, a better balance of incentives for their continued use would result.

TRT, on the other hand, recognizes that there are technical, economic and "international relations" considerations which impose practical limits on the number of United States earth stations that may be operated within the INTELSAT system. Therefore, TRT advocates that the Commission's policy should be to authorize new earth stations only on a case-by-case showing of economic and technical feasibility. Thus, the Commission would assure that proper trade-offs are made of the costs and benefits of additional earth stations. Further, TRT maintains, the required operational compatibilities can also be assured through the authorization process.

11. Home Box Office, Inc. (HBO). HBO focuses its comments primarily upon individual carrier ownership of special purpose stations, which it defines as either providing customized services or being located at certain specialized locations (e.g., customer premises).

HBO argues that, as a matter of law, the Commission has broad discretion in licensing the ownership and operation of INTELSAT earth stations. HBO believes that Congress adopted the language in Section 201(c)(7) of the Satellite Act "to make it clear that there is no legislative prejudgment as to who shall establish a ground terminal station." HBO also avers that the INTELSAT Agreements also do not constrain the Commission's discretion in changing the current earth station ownership policy.

HBO argues that, as a matter of policy, the FCC should permit individual carrier ownership and operation of INTELSAT earth stations. HBO believes that the development of competition in the telecommunications industry requires a revised ownership-policy which is consistent with the flexible domestic environment. HBO claims that individual ownership will give carriers the opportunity to design and price their service offerings to meet customer requirements quickly and efficiently.

HBO addresses specific technical and operational aspects of the end-to-end communications path which it claims compel revision of the current ESOC policy. HBO believes that the fundamental goal should be end-to-end efficiency and quality of service. HBO argues that earth stations owned and operated by individual carriers and located on or near customer premises will improve efficiency and quality of service. HBO analyzes three elements of the end-to-end path: the terrestrial link, the earth station, and the INTELSAT space segment. As to the terrestrial link, HBO sees customer premise earth stations as eliminating or reducing the need for this link and thus avoiding the problems associated with this link. These problems include the addition of noise to the signal (reducing the signal's quality), the unavailability of the link at critical times due to congestion, and errors in the switching and other aspects of network management. As to the earth station segment, HBO points out that in both the Atlantic and Pacific Regions many independent earth stations serve populations roughly equivalent to that in the United States. Further, HBO argues that competitive customer premise stations will stimulate technical innovation to meet the specific needs of individual users as to both the type of traffic to be handled and the balancing of signal quality and cost. Finally, as to the INTELSAT space segment, HBO argues that TDMA is becoming the standard method of sharing capacity within INTELSAT and that a TDMA system is not subject to the same problems as an FDMA system (i.e. loss of capacity from multiple earth station access). Further, HBO avers that SCPC/PSK signalling will eventually be used for transmission from Standard B stations and this signalling is also superior to FDMA in promoting satellite efficiency.

HBO also addresses the argument that an increase in the number of U.S. earth stations would adversely affect INTELSAT's ability to control interference among INTELSAT system users and with other systems. HBO claims that INTELSAT and its users have successfully dealt with similar situations in Europe. Further, HBO argues that frequency management and interference issues will be even easier to handle as TDMA use becomes more prevalent in the system.

HBO discusses both the benefits and operational costs associated with a flexible ownership policy for customer premises stations. The benefits claimed are: (1) the opportunity to design features to meet the requirements of specific users; (2) the opportunity to provide a high level of security; and (3) the improved transmission quality and reliability achievable by eliminating a long terrestrial link to a centralized earth station. HBO states that these benefits are particularly useful for international television transmission. HBO also avers that these benefits can best be achieved by competitive rather than consortium ownership.

HBO believes that the only cost associated with independent ownership is the administrative burden involved in the creation of a new coordination mechanism to assure efficient, nonharmful operation of the stations. Moreover, HBO proposes a model of such a coordination mechanism. As a preliminary matter, HBO advocates that the operators of all earth stations would continue to obtain licenses from the Commission pursuant to Title III of the Communications Act. This license would establish the necessary technical operation practices for orderly operation within the INTELSAT system. Further, HBO advocates that the Commission require the establishment of an International Technical Coordination Office ("ITCO") with separate cost accounting. The U.S. Operations Representative to INTELSAT would be a Comsat staff member assigned to ITCO. The ITCO would operate under rules established by the Commission which are designed to ensure non-discriminatory treatment of all U.S. earth station operators. ITCO would perform both short and long term coordination of earth and space segments. In the event of any disagreement between ITCO and one or more of the independent earth station operators, the matter would be referred to the Commission.

HBO also addresses the economic issues associated with revision of our current ESOC policy. HBO believes that users can best decide for themselves whether to continue using ESOC earth stations or to choose stations nearer their premises. HBO believes that such an approach will lead to an optimum economic solution. HBO evaluates total system cost effectiveness and compares three major categories of costs in a centralized ESOC configuration to the same costs in a decentralized individual carrier configuration. These categories are terrestrial transmission costs, earth station costs, and space segment costs. HBO argues that customer premises stations would reduce terrestrial costs in such a manner as to reduce the overall end-to-end cost of a circuit by about 15 percent. As to earth station costs, HBO claims that Standard B stations provide lower per circuit costs than Standard A stations. Also, HBO reasons that large general purpose stations will continue to handle message telephone traffic, and other switched services, which represent the majority of international traffic. HBO also believes that, given the rapid growth rate of international traffic, it is unlikely that any diversion of traffic would result in an actual decrease of traffic through the ESOC network. Finally, as to space segment costs, HBO alleges that any increased costs due to inefficient access would be present only temporarily (until the introduction of TDMA in the mid-1980's) and, in any case, would be offset by cost savings in the terrestrial access.

12. M/A-COM, Inc. M/A-COM is a manufacturer of Single Channel Per Carrier (SCPC) and Time Division Multiple Access (TDMA) earth station equipment. M/A-COM argues that the Commission should permit independent customer premises and other special purpose earth stations to be used in connection with the INTELSAT system because they will help satisfy user needs that are not now being met, will increase competition in the supply of

communications equipment and services, and will result in lower prices for new international telecommunications services as demand is stimulated.

M/A-COM claims that the current general purpose ESOC network is either too expensive or technically deficient in satisfying the needs of certain user groups, such as the energy, banking, newspaper, and video entertainment industries. In particular, M/A-COM believes that the current network is unsuitable because of the need for terrestrial microwave backhaul, which imposes significant technical and economic cost penalties and operational burdens. M/A-COM advocates allowing customers to weigh the merits of special purpose versus general purpose stations.

M/A-COM also argues that INTELSAT will benefit from expanded earth station ownership. M/A-COM asserts that INTELSAT may soon have competitors for international communications traffic and therefore must have flexibility to compete. M/A believes that our current earth station policies provide no such flexibility. For instance, M/A-COM argues that the use of Standard A antennas imposes on INTELSAT users costs which are far greater than the benefits in increased space segment capacity created by such antennas. M/A-COM believes that smaller antennas would result in lower costs to users.

M/A-COM also believes that there are many conflicts of interest in Comsat's dual role as U.S. Signatory and 50 percent owner of ESOC. For instance, M/A-COM asserts that it is contrary to Comsat's interests to permit INTELSAT to adopt technical standards for small customer premise earth stations because Comsat would lose revenue and the power to control this new earth station investment if INTELSAT were to adopt such standards. These losses would arise because these earth stations would likely be owned by non-Comsat affiliated carriers.

As to technical issues, M/A-COM asserts that special purpose earth stations will not result in technical or economic harm to INTELSAT or its users. M/A-COM reasons that although multiple access of a transponder in the (analog) FDMA mode may reduce satellite efficiency, multiple access in a (digital) TDMA mode should have minimal adverse effect. M/A-COM also asserts that not only will TDMA transmissions from Standard A stations not reduce capacity significantly, but these transmissions from Standard B stations will also have little negative effect if certain additional equipment is added. This equipment would provide for either forward error correction coding at the earth stations or on-board regeneration of the signals on the spacecraft. Further, M/A-COM believes that even if special purpose earth stations are used in a mode, such as FDMA, that reduces INTELSAT space segment capacity, then INTELSAT could increase its space segment charges proportionately to recover its full costs. In this light, M/A-COM proposes that the Commission instruct Comsat to advocate reasonable INTELSAT charges to users of special-purpose stations.

As to operational issues, M/A-COM believes that implementation of TDMA transmissions through Standard B earth stations can help reduce the complexity of INTELSAT network planning. M/A-COM avers that it is simpler to achieve multi-nation connectivity through TDMA access than through FDMA or SCPC access.

On another matter, M/A-COM asserts that structural controls alone on Comsat will not be sufficient to protect Comsat's competitors under the more open earth station ownership policy it proposes. M/A-COM believes that broader public participation in the instructional process will be necessary.

13. Communications Satellite Corporation (Comsat). Comsat asserts that changes in the way basic earth station facilities are made available would not, as a practical matter, produce meaningful competition. Moreover, Comsat believes independent ownership would cause a number of serious problems. Comsat sees a policy of unrestricted independent ownership as

triggering a proliferation of earth stations which would hamper efficient, reliable, and cost-effective operation of the U.S. earth station network, and optimum utilization of the INTELSAT system. Comsat asserts that any increase in the number of U.S. stations must be carried out pursuant to a careful planning process similar to that of the current ESOC arrangement.

Comsat asserts that the existing ESOC arrangement has served the public interest. Comsat believes that it has resulted in the establishment of efficient, cost-effective earth stations capable of satisfying user requirements without the duplicative investment that would have resulted if individual carriers had been authorized to construct their own facilities. Further, the ESOC stations have taken the form of large volume, general purpose earth stations which maximize the useful life of the satellites with which they communicate. Comsat believes that ESOC as a single owner is able to reconfigure the stations to accommodate growth of traffic, transitions to new satellites, and restoration of service when required. Comsat avers that in order to assure the provision of reliable service, there must be centralized coordination among all stations and centralized management of relationships with INTELSAT, foreign earth station operators, and U.S. carriers.

Comsat asserts that independent ownership of general purpose earth stations would not produce competition and would otherwise be undesirable. Comsat does not believe competition in this area is feasible. Comsat states that given the relative market positions of the U.S. international service carriers and the enormous expenditures involved in constructing or acquiring general purpose stations, meaningful competition would not result. Instead, independent ownership would have a substantial number of adverse effects.

First, Comsat avers that independent ownership would reduce significantly the level of technical efficiency of the INTELSAT system. Adverse impacts include inefficient use of existing capacity (by transmitting the same amount of traffic on more carriers); further loss of satellite capacity due to the use of Standard B or non-standard access rather than Standard A or Standard C access; diminished effectiveness of the INTELSAT TDMA system that is about to be implemented; and increased susceptibility to internetwork and intranetwork interference.

Second, Comsat avers that independent ownership would complicate the operation of the international earth station network. Comsat believes that the coordination necessary to perform the myriad of operational activities within the INTELSAT system simply could not be achieved under an independent ownership scheme. Comsat reasons that as long as the particular service requirements of the independent owners were met, these owners would not have the requisite interest in the overall efficiency and reliability of the U.S. network. Further, operations by carriers solely in their individual interests, Comsat maintains, would reduce service performance and cost effectiveness.

Comsat does not believe it is practical for it to represent different owners in Operations Representatives meetings. Even worse, Comsat alleges, would be permitting independent owners to attend and participate in these meetings. Such representation, claims Comsat, would dilute the U.S. position, especially in the areas of transponder utilization, diversity routing and restoration planning, to the advantage of foreign administrations.

Third, Comsat states that independent ownership would impose unnecessary space segment and ground segment costs on the INTELSAT system and its users. As to space segment costs, Comsat believes that additional investment for new satellites will be incurred earlier than would otherwise be necessary. With respect to ground segment costs, Comsat states that the ESOC arrangement has employed various technological advances in modulation techniques that permit aggregation of large volumes of traffic in large, high efficiency RF carriers. This aggregation results in a decrease in the per unit cost of earth segment

services. Equally important, Comsat believes, is the fact that if carriers are authorized to construct additional facilities without showing that existing facilities are unable to accommodate the traffic anticipated to be carried through the new stations, there would be an increase in the total investment in U.S. earth stations to handle the same amount of traffic. This overinvestment would increase costs to users. Finally, Comsat asserts that multiple independently owned earth stations would also increase the equipment requirements of other INTELSAT members. Each foreign correspondent, Comsat states, would be required to buy additional equipment to operate with the new U.S. earth stations.

Finally, Comsat states that independent ownership would raise important foreign policy concerns. Comsat believes that any action taken by the United States that adversely affects the INTELSAT communications system as a whole would inevitably serve to undermine U.S. leadership. For the U.S. now to adopt policies blatantly inconsistent with the principles of conservation of electro-magnetic spectrum and orbital resources, would affect U.S. credibility on these projects and would make it difficult for the U.S. to encourage other countries to conserve these resources, claims Comsat.

On another topic, Comsat advocates that the Commission authorize special purpose stations to independent owners but only in limited, well-defined circumstances where compelling justification exists. In addition, Comsat asserts that it would like to remain the overall System Manager for these stations on such matters as circuit activation, network management, system plans, maintenance, and billings.

Comsat proposes the following regulatory criteria for these special purpose stations:

1) There should be a single service (e.g. television) provided through the station;

2) There should be a single carrier providing the service;

3) The service to be provided through a special purpose station should be one that could not be provided by a general purpose station; and

4) The service should not be priced to the customer below full cost.

If these criteria are not met, Comsat believes that special purpose stations will evolve into general purpose stations and thereby give rise to problems inherent in the ownership of such stations.

On another topic, Comsat discusses its desired role in ESOC (should ESOC continue to exist). Comsat wants to maintain 50 percent ownership interest in ESOC in order to represent the interests of the global satellite system as a whole. Similarly, Comsat believes it is in the best position to perform centralized management functions. Comsat states that the practical effect of the proposals to eliminate Comsat's ownership interest and managerial function would be to turn ownership and management over to AT&T, the preponderant carrier-use of earth station facilities. Comsat avers that this result will not encourage competition in the provision of international communications services.

On the subject of whether the Comsat World System Division or a subsidiary should participate in the ownership of earth stations, Comsat proposes ownership by the World Systems Division. Comsat avers that exclusive ownership through a subsidiary would contravene Section 201(c)(8) of the Satellite Act. Comsat reasons that ownership of earth stations is an inextricable part of Comsat's business under the Act and should therefore be in the World Systems Division name.

14. All America Cables and Radio, Inc. [AAC&R] and ITT World Communications, Inc. [ITT Worldcom]. AAC&R and ITT Worldcom, filing jointly, maintain that the Commission should authorize independent earth stations - both general and special purpose - on a case-by-

case basis, under the statutory public interest standard. In support of this change of policy, they state that improved technical coordination procedures would be appropriate and can be achieved without a Comsat monopoly. Instead, they advocate creation of an International Technical Coordination Office (ITCO) within the Federal Communications Commission.

Further, they aver that all of Comsat's earth station activities be transferred to a non-monopoly separated subsidiary. They find no policy or legal barrier to prohibit such a transfer.

Finally, they argue that because of the lack of mutual consent among its members, ESOC has been rendered unviable and should be abolished.

Comments and Replies on
Comsat's Proposal

1. Home Box Office, Inc. (HBO). HBO indicates that it is not a member of the ESOC consortium and is not primarily interested in issues relating to the dissolution of the present ownership arrangements. Rather, HBO is concerned that the benefits of independent ownership be no longer withheld from international satellite service consumers and that the economic and operational arrangements instituted in any new independent ownership environment are reasonable, non-discriminatory, and suitable for an emerging competitive environment.

HBO states argues that the Commission should not establish a moratorium on applications for independent earth stations as Comsat suggests. HBO believes that, whatever the merits of a transition period for the dissolution of existing ownership arrangements, the public interest favors immediate consideration of applications for independent earth stations. HBO argues that Comsat's justification for the moratorium is anti-competitive, unnecessary, and illogical. HBO asks that the Commission accept applications for independent carrier-owned earth stations, either general purpose or special purpose, prior to the close of this proceeding. HBO believes that the information which would become available and the experience that would be gained would be helpful in resolving the remaining earth station ownership issues.

Further, HBO avers that the Commission should not accept artificial distinctions between special and general purpose stations. HBO reasons that it is becoming more and more difficult to distinguish between the two. HBO cites the recent application by Comsat for authority to construct and operate an INTELSAT earth station at New York's Teleport Complex as an example of a station having both special and general purpose characteristics.[1]

HBO also discusses the types of operational and economic arrangements it would like to see implemented in a competitive environment. Operationally, HBO advocates creation of an International Technical Coordination Office (ITCO), which would be an independent body, to coordinate such functions as circuit activation, network management and system planning for the emerging network of U.S. earth stations. As a second choice, HBO would accept Comsat as the System Manager for this network of earth stations if certain conditions could be met. These conditions include the establishment by the Commission of procedures to assure that Comsat treats all earth station owners (including itself or its affiliates) in a non-discriminatory manner. Economically, HBO argues that Comsat should unbundle its tariff in a way that would isolate costs of performing coordination of the earth station network. These costs should then be identified as a separate element in addition to the element relating to the provision of the satellite channels themselves. HBO reasons that in the event the Commission ultimately decides that some entity other than Comsat should coordinate the activities of U.S. earth stations, isolation of these costs will make such a transition easier to accomplish.

[1] Communications Satellite Corporation, File No. CSG-83-034-P/L.

2. American Telephone and Telegraph (AT&T). AT&T favors independent carrier ownership of U.S. earth stations and the phasing out of the present ESOC arrangement. AT&T objects to the Comsat proposal to the extent that it unnecessarily delays creation of a more competitive environment by imposing operational restrictions on other carriers' construction of general and special purpose stations during an extended transition period.

As to the phasing out of ESOC, AT&T sees alternatives to Comsat's combination earth station approach. In addition to the option of combination stations, AT&T recommends that carriers should be permitted to transfer their ESOC ownership interests so that a single carrier could obtain 100 percent ownership of an ESOC station for its own service requirements to the public. AT&T proposes that these single carrier stations be used both for general and special purpose applications. AT&T also objects to Comsat's proposal on the grounds that mandatory use of combination stations during the transition period would continue that aspect of the arrangement under ESOC wherein carriers are required to use facilities owned by others in providing their services.

AT&T supports unbundling of Comsat's rates prior to any transition period. However, AT&T believes that Comsat is not clear with regard to whether it will offer full or partial transponder leases, rather than only individual channels as presently structured. AT&T believes increased efficiency and lower tariffs to end users will result from availability of transponder leases.

AT&T argues that there is no need for a moratorium on applications for construction of general purpose stations. Rather the Commission should expeditiously decide that independent ownership is allowed as a matter of policy and consider immediately individual applications. In determining whether the public interest is furthered, the Commission could consider the impact on existing ESOC stations, and could also condition approval of non-discriminatory access to all carriers.

3. Western Union (WU). WU claims that the primary effect of Comsat's proposed moratorium on earth station applications would be to enable Comsat to solidify its dominance of the market. Accordingly, Western Union urges the Commission to reject Comsat's proposal to the extent that it would delay the authorization of U.S. carriers to construct and operate new general purpose and special purpose earth stations.

4. International Communications Association (ICA). ICA is a non-profit business organization of major corporate, educational, and governmental users of telecommunications equipment, facilities, and services. ICA expresses concern that portions of Comsat's proposal, if fully implemented, would not be in the interests of telecommunications users or the public.

5. TRT Telecommunications Corporation (TRT). TRT states that, although it would prefer to see the ownership and operation of the present ESOC earth stations transferred to end-to-end carriers (including Comsat's retail carrier subsidiary) in proportion to use, it believes Comsat's proposal to acquire these stations and operate them exclusively for carriers has sufficient merit to warrant further study. However, TRT opposes Comsat's suggested three year moratorium on authorization of other carriers to construct and operate earth stations. TRT argues that this moratorium is too broad in that it would prohibit competition in the provision of most special purpose earth stations services, including those for INTELSAT's proposed International Business Service. TRT disagrees with Comsat that such a moratorium would help assure continued non-discriminatory access to the INTELSAT system. TRT, instead, believes that the prospects for smaller carriers to obtain access to INTELSAT on fair and equitable terms would be improved if earth station services were available from multiple competitive vendors. In addition, TRT argues that the almost total moratorium on competing earth stations which Comsat seeks is not necessary in order to preserve the viability of the ESOC general purpose stations. TRT states that no party in this proceeding has argued that

applications for competing stations should be automatically granted without regard to public interest considerations. TRT agrees with Comsat that the Commission should deny any applications for proposed stations which would jeopardize the continued viability of the existing general purpose stations and thereby jeopardize continued non-discriminatory access to the INTELSAT system for all carriers.

6. RCA Global Communications, Inc. (RCA). RCA argues that the Commission should rule immediately in this docket that the international service carriers may, as a matter of law and policy, construct, own and operate international earth stations.

7. American Broadcasting Companies, Inc. (ABC), CBS, Inc. (CBS), and National Broadcasting Company, Inc. (NBC) [Networks]. The principal purpose of the jointly filed Networks' comments is to urge the Commission not to disturb the policy established in the SIN decision[2], wherein the Commission concluded that Comsat may provide international television service directly to television customers, such as ABC, CBS, and NBC. The Networks believe that they obtain operational and economic benefits from this form of access to the INTELSAT system. In addition, the Networks argue that it would be unfair and unnecessarily disruptive to require abrogation of arrangements that they made in reliance on this decision.

8. Western Union International, Inc. (WUI). WUI argues that the Commission should order the dissolution of ESOC forthwith following the submission to it of a dissolution plan by the ESOC partners. Further, WUI believes that the Commission should adopt promptly an open entry earth station policy, rather than allow a length transition period as proposed by Comsat.

9. Western Systems, Inc. (Western Systems). Western Systems owns and operates a cable television system in Guam. Although Guam is a territory of the United States, it does not have access to any of the U.S. domestic satellites, but must instead operate with INTELSAT. Western Systems believes that it should be given the authority to own and operate its own general purpose INTELSAT earth station in Guam in order to provide lower rates to its customers. Therefore, Western Systems opposes Comsat's proposal on the grounds that it would delay this necessary modification to Commission policy.

10. All America Cables and Radio, Inc. and ITT World Communications Inc., filing jointly (ITT). ITT maintains that the Commission should reject Comsat's proposal and enter, instead, an immediate declaration that applications for independent earth stations will be entertained under the public interest standard. ITT further argues that such a declaration should not be delayed by any perceived need to issue an NPRM, since there is not a legally binding policy affording exclusivity to ESOC which needs to be repealed or modified. ITT acknowledges that while further proceedings may be appropriate over such issues as an earth station coordination mechanism and the procedures for dissolution of ESOC, these are collateral to a policy of immediately entertaining applications for independent earth stations.

ITT also states that Comsat's investment in INTELSAT earth stations should be reduced to a level reasonably related to Comsat's use. Thus, in connection with any further proceedings respecting dissolution of ESOC, any proposed policy giving Comsat the equivalent of 60 percent of the ESOC assets, as ITT believes would occur under Comsat's combination earth station proposal, would be improperly preferential. ITT also argues that Comsat should *not* be given a dominant role in the coordination of independent earth stations. Rather, it desires that coordination be established either by a transitional network management committee or by a modified version of the International Technical Coordination Office proposed by HBO.

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[2] Spanish International Network, 70 FCC 2d 2127 (1978) (hereinafter the *SIN* decision).

11. American Satellite Company (ASC). ASC is concerned with three issues raised by Comsat's proposal. First, ASC desires that Comsat include only proper costs in its unbundled space segment tariff. Second, ASC believes that the three year transition period proposed by Comsat is far too long. Finally, ASC argues that development and approval of an ESOC phase-out plan should not delay the progress of the Commission in changing its policy to permit independent ownership of INTELSAT stations.

12. National Telecommunications and Information Administration (NTIA). NTIA argues that Comsat's concept of a wholesale/retail combination earth station has merit and should be given consideration. It disagrees, however, with Comsat's proposed moratorium, which it believes would give Comsat three years to solidify its markets at both existing facilities and at new ones it constructs.

Instead, NTIA believes that the Commission should immediately accept applications and consider them in the context of the statutory public interest standard. Specifically, the economic impact of a proposed earth station on existing facilities should be considered (among other effects) during the review of these individual applications. NTIA also suggests that applications by AT&T for earth station ownership be given very close scrutiny, as they may raise serious concerns about the maintenance of healthy competition in the U.S. market in international communications services.

13. Hawaiian Telephone Company (HTC). HTC prefers that the ESOC ownership and operating arrangement be continued at the existing stations. HTC states, however, that if the Commission does decide to dissolve ESOC, it should allow the joint owners wide latitude to negotiate on a station-by-station basis appropriate arrangements for future ownership and operation.

HTC is also concerned with other aspects of Comsat's proposal to convert existing stations into "combination" stations. HTC does not support this proposal and believes that Comsat may have no intention of "buying out" the investment interests of other joint owners, by may hope merely to allocate "equipment" at each station among owners. Hawaiian, however, is not interested in becoming an owner of various component parts of a station. Instead, if the Commission dissolves ESOC and approves "combination" stations, it desires to recover its investment from Comsat (or the ultimate owner) at the time of the conversion.

Hawaiian does not believe that Comsat's proposal is aimed at developing a more flexible competitive environment. Rather, it avers that Comsat has developed a scheme to gain almost complete ownership and operating control over all existing stations and to develop a wide array of services at competitive rates so that future earth station competition can be forestalled.

As to Comsat's proposed development of new services and rates, HTC has three concerns. First, HTC believes the aspect of Comsat's proposal advocating revision of the *Authorized User Revisited* decision will unnecessarily delay this proceeding. Second, HTC hopes that the Commission will pay particular attention to the development of rates and allocation of costs for Comsat's "wholesale" services. Third, HTC expresses concern that Comsat's proposal does not address the issue of rate deaveraging. HTC advocates the continuing averaging of rates for high and low density routes.

As to the unbundling aspect of Comsat's proposal, HTC advocates that the Commission should require that this be done immediately. Further, HTC believes that Comsat's space segment charges should include only those costs *directly* associated with providing satellite channels of communications to the end-to-end carriers.

Finally, HTC argues that although there would be need for some transition period to phase in restructured arrangements at existing ESOC stations (if ordered by the Commission,) it

does not agree that a moratorium should be placed on independent ownership of INTELSAT earth stations pending reorganization of ESOC.

14. M/A-COM Inc. (M/A-COM). M/A-COM argues that COMSAT's proposal for "combination" earth stations is anticompetitive on its face and would undermine existing Commission policies designed to protect against anti-competitive abuses. It believes that the proposal creates an inherent conflict of interest between the performance of Comsat's role as earth station "wholesaler" and its competitive ambitions. Further, M/A-COM avers that the proposal will limit the range of competitive service options open to users. Specifically, it would not rapidly respond to the requirements for customized capacity to meet unique requirements. M/A-COM also opposes Commission reconsideration of the *Authorized User Revisited* decision because of the delay in the introduction of independent earth stations that would result.

M/A-COM argues that Comsat's concerns over loss of value in existing facilities may be remedied without foreclosing competition in the provision of earth station services. In effect, the Commission, in the exercise of its Section 214 and Title III powers, would act to ensure that the carrier investment in new facilities is justified and would not result in unnecessary or duplicative facilities.

M/A-COM also maintains that Comsat's proposal is antithetical to international service concepts embraced by INTELSAT and is inimical to INTELSAT's long-term interests. M/A-COM believes that INTELSAT contemplates a broad diversity of earth station access arrangements. Also, from a technical standpoint, M/A-COM points to INTELSAT's introduction of new international business services that contemplate multiple earth station scenarios.

Finally, M/A-COM avers that formal rulemaking is not necessary to implement a policy allowing carriers to begin applying immediately for independent earth stations. M/A-COM suggests that where the affected parties as here could clearly foresee that a policy change was due, these parties would not be unfairly prejudiced by an abrupt change in policy as M/A-COM advocates. M/A-COM sees the need for a rulemaking only with respect to the disposition of ESOC.

Comparative Hearing
Diversification
Financial Qualifications
FM Station, Authorization
Ownership and Management, Integration of

Review Board affirmed *I.D.* grant to applicant proposing to move its FM station to new channel, divest its AM station in community, and integrate into management 96.4% of its ownership which is qualitatively enhanced by long-term local residence, civic participation, and extensive broadcast experience. Two closest applicants proposed 100% integration but were less enhanced.
—*Vacationland B/cing Co., Inc. (WFTW-FM)*
BC Docket No. 81-855

FCC 84R-22

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
VACATIONLAND BROADCASTING COMPANY, INC. (WFTW-FM) Ft. Walton Beach, Florida	BC Docket No. 81-855 File No. BPH-790518AA
For Construction Permit to Make Major Changes in the Facilities of Station WFTW-FM	
MIRACLE STRIP COMMUNICATIONS, INC. Ft. Walton Beach, Florida	BC Docket No. 81-856 File No. BPH-790509AA
JUANINA, INC. Ft. Walton Beach, Florida	BC Docket No. 81-858 File No. BPH-791114AD

PINNACLE BROADCASTING CORPORATION Ft. Walton Beach, Florida	BC Docket No. 81-859 File No. BPH-791115AB
DA-GON BROADCASTING COMPANY, INC. Ft. Walton Beach, Florida	BC Docket No. 81-861 File No. BPH-791115AI
For Construction Permit for a New FM Station	

Appearances

Dennis J. Kelly, Alfred C. Cordon, and *John B. Jacob,* on behalf of Vacationland Broadcasting Company, Inc.; *Lauren A. Colby,* on behalf of Miracle Strip Communications, Inc.; *Chester F. Naumowicz, Donald E. Ward,* and *Eric S. Kravetz,* on behalf of Juanina, Inc.; *Robert S. Stone,* on behalf of Pinnacle Broadcasting Corporation; and *James L. Oyster,* on behalf of Da-Gon Broadcasting Company, Inc.

DECISION

Adopted: April 6, 1984; Released: April 18, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN) AND JACOBS. BOARD MEMBER BLUMENTHAL NOT PARTICIPATING.

BOARD CHAIRMAN MARINO:

1. This comparative case includes five competitors: a proposal by Vacationland Broadcasting to move its existing Station WFTW-FM to Channel 243, and four other applications proposing a new FM broadcast station on that channel at Ft. Walton Beach, Florida. The Case largely turns on the credit to be given the respective applicants for proposed ownership participation in management. See paras. 20 to 22 below. After a trial-type hearing, in an Initial Decision, FCC 83D-56, released October 7, 1983, Administrative Law Judge Gonzalez granted the application of Vacationland Broadcasting which was preferred because of its participating principal's long-time local residence, civic participation, broadcast experience, and for proposed use of auxiliary power. All of the applicants have filed exceptions. Upon review of the record, briefs, and the oral argument held January 20, 1984, we adopt the Initial Decision's findings of fact and conclusions of law, except as modified below, and affirm the

ALJ's ultimate conclusion that Vacationland Broadcasting is the best comparative applicant.

2. *Da-Gon's Financial Qualifications.* Because Da-Gon had filed a June 26, 1981 engineering amendment reflecting a proposed change of transmitter site, and in a June 23, 1982 amendment specified that the transmitter site move would increase its expenses by $25,000, a figure the ALJ considered unrealistically low, the ALJ added an issue to determine the amount of Da-Gon's additional costs and the source and availability of funds to cover them. *I.D.*, para. 38. At hearing, the applicant explained that the $25,000 figure represented its expected increased lease costs over the three-month period of initial operation and that the total additional costs resulting from its site change would be $180,000. *I.D.*, para. 39. The ALJ concluded that Da-Gon was financially disqualified because, first, it had failed to provide sufficient detail concerning the $180,000 additional cost figure and, second, it had failed to show that its lender, Planitt Financial Services Incorporated, had sufficient liquid assets to meet its commitment to lend Da-Gon an additional $25,000. *I.D.*, paras. 41-43. We agree with Da-Gon that it should not have been financially disqualified. First, its additional cost estimate of $25,000 is not unreasonable on its face – *cf. James B. Francis*, 41 FCC 2d 303 (Rev. Bd. 1973) – and we are confident that, had the applicant initially explained to the ALJ that only $25,000 of its $180,000 total cost increase had to be provided during initial operation, the ALJ would not have added the cost estimates aspect of the limited financial issue against Da-Gon. Second, the balance sheet for Planitt, submitted by Da-Gon in its original application, shows that Planitt has a net worth of $341,447, of which $199,229 is cash. In addition, Planitt's accounts receivable, which total $95,548 and which are not relied upon as a liquid asset to be available as a source of funds, may be relied upon as a current asset to partially offset Planitt's current liabilities of $113,688. *See Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 706-07 (Rev. Bd. 1982). As a result, Planitt's balance sheet shows current and liquid assets sufficient to meet current liabilities with sufficient liquid assets remaining to advance the funds required by Da-Gon. Although we share the ALJ's concern over Da-Gon's failure to submit a current balance sheet for Planitt, we would have to either remand the proceeding or request additional information to resolve this deficiency and such a procedure is not needed here because of Da-Gon's distant finish in the comparative contest, *see* note 2 and para. 27 below.

3. *Diversification of Control of the Mass Media* is a comparative "factor of primary significance," *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394, 5 RR 2d 1901, 1908 (1965). All applicants were found equal on this factor. *I.D.*, paras. 53-56. Miracle Strip, Juanina, and Da-Gon were found to have no attributable media

ownership interests, and Pinnacle's less than 1% attributable interest in a multi-station owner was found to be *de minimis.* Vacationland was not penalized for its present ownership of AM Station WFTW, Ft. Walton Beach, because of its firm commitment to divest that station. Also, it suffered no demerit for its ownership of Station WFTW-FM, whose facilities it here seeks to improve by changing radio channels.

4. Miracle Strip (Br. at 6-8), Juanina (Br. at 3-5), and Pinnacle (Br. at 8-13) except to the ALJ's determination not to award them a diversification preference over Vacationland because of its present ownership of Stations WFTW and WFIW-FM. In addition, Da-Gon (Br. at 13-14) claims a diversification preference based on its minority ownership. Finally, Vacationland (Br. at 5-9) seeks a preference because a grant of its application will result in *two* frequencies becoming available – one from the divestment of its AM station and the other as a result of its move from 99.3 MHz, FM Channel 257A, to the frequency here at issue, 96.5 MHz, FM Channel 243C. We affirm the ALJ's exercise of sound legal judgment and very good common sense in concluding that no diversification preference should be awarded here.

5. First, Miracle Strip, Juanina, and Pinnacle challenge the sufficiency of Vacationland's commitment to divest its AM station. However, on November 15, 1979, before the expiration of the period for filing predesignation amendments as a matter of right in this case, *see* 47 CFR §73. 3522(a)(2), Vacationland amended its application to include a "firm commitment and agreement" to divest its AM station prior to commencing its new operation if its instant application is granted. Amendment to Question 21A. Vacationland reiterated this commitment at hearing in its Exhibit 3. Under cross-examination, Vacationland's President Wilbur R. Powell solidly reaffirmed his intent to sell the AM station if the FM application is granted, but also stated that thus far no attempts to sell the station have been undertaken, that he did not know what the station was worth, and that he did not know exactly what he would do if, hypothetically, he were to receive no offers for the station. Tr. 58-62. In our view, the evidence clearly supports the ALJ's conclusion that Vacationland made an unconditional and timely divestment commitment and, therefore, its present ownership of the AM station should not count against it for diversification purposes. *See WHW Enterprises, Inc.,* 89 FCC 2d 799, 813-14, 51 RR 2d 409, 419 (Rev. Bd. 1982), *rev. denied,* FCC 83-368, released September 15, 1983. In view of the hearing testimony that the station has not yet been sold, however, and in order to ensure compliance with its representation, we will place a divestiture condition on Vacationland's grant. *See id.* at 814, 51 RR 2d at 419.

6. Second, the opposing parties urge that Vacationland be assessed a demerit for its present ownership of Station WFTW-FM. Although we

would ordinarily agree with this argument, no demerit will be assessed because in the unusual facts of this case a grant to Vacationland will make two frequencies available to newcomers.

7. In *Minneapolis Star & Tribune Company*, 88 FCC 2d 1604, 1606-609, 50 RR 2d 1481, 1484-486 (Rev. Bd. 1982), *rev. dismissed*, FCC 83I-82, released July 20, 1983, the Board considered exhaustively the application of the Court of Appeals opinion in *Miner* v. *FCC*, 663 F.2d 152 (D.C. Cir. 1980)to the situation where, as here, an existing licensee, in competition with one or more applicants for a new frequency, seeks to change frequencies. The *Miner* court stated that the diversification criterion should be applied "in a way that is fair and does not automatically disadvantage existing licensees." 663 F.2d at 157. In *Minneapolis Star*, we did not award a dispositively strong preference to the newcomer, holding that the award of a "slight" preference fairly balanced the certain immediate increase in diversity that a newcomer would bring with the likelihood of increased future diversity occasioned by the availability to newcomers of the channel to be vacated by the existing licensee. 88 FCC 2d at 1609, 50 RR 2d at 1485-86. Therefore, a slight diversification demerit could ordinarily accrue against Vacationland because a grant to it would merely make its existing FM channel available to potential newcomers whereas a grant to any of the other applicants would immediately add a new media voice. However, in this case we must also add into the diversification analysis Vacationland's absolute commitment to divest its AM station. Thus, we find that a grant to Vacationland, although it will not immediately bring a new media voice to Ft. Walton Beach, will ultimately result in the addition of *two* media voices to that community. On balance, the Commission's diversification policy will be served equally well by a grant to any of the applicants. For this reason we agree with the ALJ that no diversification preference should be awarded in this case. *Miner* v. *FCC, supra.*

8. We also reject Vacationland's argument that the Commission's decision in *Valdosta Broadcasting Co.*, 11 FCC 769, 3 RR 619 (1946), mandates that, because it is an existing licensee seeking to improve its present facilities, it should be preferred. That case involved an existing licensee who had "pioneered radio broadcasting" in the community, had compiled a superior past broadcast record, and had sought continuously over a five-year period, interrupted by the Commission's World War II "freeze" on applications proposing construction, to improve its facilities. The facts are not comparable here; the existing licensee has failed to show that its past record, although fully adequate, was "superior." *See* para. 23 below.

9. *Full-Time Participation of Ownership in Management: Vacationland* proposes the full-time (at least 40 hours per week) integration of

Wilbur R. Powell, its president and 96.4% stockholder, as chief operating officer of Station WFTW-FM with day-to-day ultimate responsibility for operating and managing the station. He presently performs these functions at both the AM and the FM stations. *I.D.*, para. 11; Vacationland Exh. 5. The applicant was credited for 100% full-time quantitative integration because, in addition to Mr. Powell's 96.4% ownership and proposed managerial role, his wife owns the remaining 3.6%. *I.D.*, para. 63. In reaching this result, the ALJ applied the Review Board's "spousal attribution" rule set forth in *Absolutely Great Radio, Inc.*, 92 FCC 2d 1171, 53 RR 2d 97 (Rev. Bd. 1983); however, as noted in the briefs, this rule was subsequently vacated by the Commission shortly after the release of the Initial Decision in this proceeding. 55 RR 2d 15, released October 13, 1983. In overturning the Board's spousal attribution rule, the Commission held that:

> Since integration credit is awarded for personal participation in the management of a station, ownership interests held by a husband and wife are generally evaluated separately for integration purposes. In cases where both spouses propose to work at the station, but only one spouse is entitled to integration credit for his/her role at the station, the integrated spouse is not credited with his/her spouse's interests. On the other hand, spousal attribution has been permitted in integration cases where the evidence establishes that the fully integrated spouse exercises control over the interest held by the inactive spouse.

55 RR 2d at 19 (footnotes omitted). Because there is no record evidence as to whether Mr. Powell will exercise control over his wife's ownership share, we will not award Vacationland integration credit for her share.

10. Some exceptions claim that Vacationland's Mr. Powell will not be able to effectuate his 40-hour per week integration commitment because he is 70 years old and in ill health. Miracle Strip Br. at 9-13; Pinnacle Br. at 13-15. However, the record evidence makes clear that although he suffers from arthritis, for which he takes pain-relieving medications, and walks with the aid of a cane, Mr. Powell has no other serious health problem that would restrict his work at the station (Tr. 69, 75-78) and, currently, regularly spends six days a week at his AM-FM facilities (Tr. 65, 67). He will devote at least 40 hours per week to his duties at the improved station. Vacationland Exh. 5, p. 1. He will continue to maintain ultimate authority over all station programs, budget, hiring, firing, and business decisions. *Id.* The managerial duties of the FM station's current general manager, Mrs. Zola Rowley, are performed under his direction, and all hiring and firing decisions are cleared with him. Tr. 65-66. In sum, we find that the ALJ properly credited Mr. Powell's proposed full-time managerial role at the station and, accordingly, award Vacationland 96.4% full-time

quantitative integration credit.[1] Vacationland's integration proposal is substantially qualitatively enhanced by Mr. Powell's long-time (since 1953) local residence, civic participation, and extensive broadcast experience. *I.D.*, para. 65; Vacationland Exh. 5.

11. *Miracle Strip,* which proposes to integrate full time a 75% shareholder, Lois N. Marks, as general manager and her husband, Jack Marks, a 25% shareholder, as sales manager, was awarded 100% full-time quantitative credit plus qualitative enhancement credit for its 75% integrated female ownership and the commitment of its owners to move to the community of license. *I.D.*, paras. 14-15, 59. Pinnacle excepts to the award of full-time credit to Miracle Strip because that applicant did not state how many hours per week its principals propose to devote to the station. Pinnacle Br. at 19. At oral argument, Miracle Strip responded that its principals testified (Miracle Strip Exhs. 1-2) that they would work "full-time," which the Commission has defined as at least 40 hours per week, and that its opponents had a full opportunity to cross-examine them and elicit greater detail in this regard but failed to do so. Tr. 16-18.

12. We will fully credit Miracle Strip's integration proposal. No previous case has been cited by Pinnacle, nor are we aware of any, where a proposal specifying "full-time" integration has been rejected because it lacked particularity with respect to the hourly commitment per week proposed. Long-Standing Commission practice makes clear that a "full-time" proposal is one that entails a minimum of 40 hours per week. *See, e.g., Angeles Broadcasting Network,* FCC 84R-2, released January 16, 1984, para. 21 (Rev. Bd.); *Radio Greenbrier, Inc.,* 80 FCC 2d 107, 123 n. 33, 46 RR 2d 1467, 1481 n. 33 (Rev. Bd. 1980); *Flint Family Radio, Inc.,* 69 FCC 2d 38, 41 n.5, 41 RR 2d 1155, 1159 n.5 (Rev. Bd. 1977). Administrative fairness to the applicants dictates the application of that practice here and the consequent award of full-time credit to Miracle Strip. Nevertheless, we recognize the evidentiary weaknesses inherent in awarding full-time integration credit, which pertains to a comparative factor "of substantial importance," *Policy Statement, supra,* 1 FCC 2d at 395, based only on the general statement that a principal will work "full-time rather than on a specific hourly commitment of time on a weekly

[1] On November 10, 1983, Pinnacle filed a petition to enlarge issues and reopen the record seeking an issue to determine whether Mr. Powell misrepresented his current and past managerial roles at the station based on statements of former employees alleging that Mr. Powell currently spends only 30-33 hours a week at the station. We will deny the petition because, as Pinnacle itself concedes, it fails the traditional test of being supported by newly discovered evidence which could not, by the exercise of due diligence, have been presented at the time of the hearing. *See KFPW Broadcasting Co.,* 44 FCC 2d 310 (1973). Moreover, the allegations, even if true, fail to establish a *prima facie* case that Mr. Powell will not work 40 hours per week at the station *in the future,* which is our true focus of concern.

basis to station duties. *See, e.g., Lewis Broadcasting Corp.*, 11 FCC 2d 889, 898-900, 12 RR 2d 627, 639-641 (Rev. Bd. 1968) (Separate Statement of Board Member Kessler). In our view, it is better policy to base the award of such an important credit on specific evidence rather than generalizations. Therefore, the Board takes this opportunity to announce that in the future it will expect applicants to specifically state in their direct written cases the precise hour-per-week commitment proposed for each integrated principal. Failure to provide this information or substantial justification for its absence may lead to denial or diminution of the integration credit sought.

13. *Juanina* was credited with 100% full-time quantitative integration for proposing the full-time (at least 40 hours per week) participation of both John Matkowski, a 90% shareholder, as general manager, and Kathryn A. Shea, a 10% shareholder, as station manager and director of public service broadcasting. *I.D.*, paras. 17-19, 60-61. It received qualitative enhancement credit for Dr. Matkowski's long-time local residence (since 1969), civic participation, and limited prior broadcast experience and for Mrs. Shea's female ownership participation and her proposed move to the community of license. *I.D.*, paras. 20-21, 62. In their exceptions, Vacationland, Miracle Strip and Pinnacle claim that Dr. Matkowski will not be able to effectuate his full-time integration proposal because of ill health. Miracle Strip also disparages both his civic participation, as largely limited to professional dental activities, and the small amount (10%) of Juanina's integrated female ownership in contrast to its own (75%). Pinnacle challenges the award of participation credit for Mrs. Shea, who it alleges is too unfamiliar with her role to receive any credit, and attacks Dr. Matkowski's membership in civic organizations as not sufficiently "meaningful" to warrant civic participation enhancement credit.

14. We affirm the ALJ's determination that the competitors have simply failed to show that Dr. Matkowski's medical problems – ulcers and a bad back – will prevent him from carrying out his proposed full-time duties at the station. *See I.D.*, para. 60. In fact, Dr. Matkowski explained in his testimony that broadcast management should be less stressful to his back because, unlike dentistry, it will not require standing for long periods in the same position. Tr. 218-20. Juanina is also entitled to some civic participation credit for his non-professional civic activities, *e.g.*, Elks Lodge of Ft. Walton Beach and Council on Journalism (*I.D.*, para. 20). Contrary to Pinnacle's suggestion, the record does not show that Dr. Matkowski's membership in these particular organizations is inactive or that they, like his professional memberships, will terminate upon his retirement from dentistry. See Tr. 210-13. Juanina was also properly credited for its 10% female ownership. Pinnacle's allegations concerning Mrs. Shea's proposed role are rejected as speculative and without

sufficient record support. *Cf. Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 950-52, 50 RR 2d 1142, 1147-48 (Rev. Bd. 1982) (Lack of Broadcast or non-broadcast experience not equated with inability to effectuate an integration proposal). Finally, the qualitative comparison of the applicants will be addressed at paras. 20-22, below.

15. *Pinnacle* proposes to integrate full time (at least 40 hours a week) two 35% shareholders, William H. Seaver as general manager, announcer and salesman, and James W. Wesley as sales manager and news director. *I.D.*, paras. 23-24. The remaining 30% is owned in equal shares by their wives, Mrs. Wilma S. Seaver and Mrs. Brenda C. Wesley, who will each devote a minimum of 30 hours a week to the station. Mrs. Seaver is proposed as traffic director, treasurer, bookkeeper, and salesperson. Mrs. Wesley will be the public affairs director and a salesperson. *Id.* Pinnacle was awarded 100% full-time quantitative credit based on *Absolutely Great Radio, supra*, 92 FCC 2d 1171. *I.D.*, para. 66. As Pinnacle candidly concedes (Br. at 14, 26), however, in the aftermath of the Commission's annulment of the spousal attribution rule in that case, the ALJ's findings of fact entitle it at most to full-time quantitative credit of 70%, plus 30% substantial credit for its 30-hour per week proposals, *Webster-Baker Broadcasting, supra*, 88 FCC 2d at 953, 955-56, 50 RR 2d at 1149, 1150-51 (Rev. Bd. 1982); *Van Buren Community Service*, 87 FCC 2d 1018, 1021, 50 RR 2d 115, 118 (Rev. Bd. 1981). Nevertheless, in its exceptions, Pinnacle points to the ALJ's award of full-time quantitative credit to Miracle Strip (see paras. 11-12, above) and urges that, as a matter of equal treatment, it should receive full-time credit for Mrs. Seaver and Mrs. Wesley.

16. We deny Pinnacle's exception. In a predesignation amendment to its application filed August 6, 1980, Pinnacle proposed in response to Question 27 the integration of its two female stockholders "on a full-time basis (30 hours per week)." However, a commitment of a minimum of 40 hours per week is needed to earn full-time quantitative credit. See para. 11, above. Participation proposals specifying minimum commitments of 30 hours per week are eligible for substantial credit only, which is disproportionately inferior to full-time credit. *Webster-Baker Broadcasting, supra*, 88 FCC 2d at 956. Pinnacle's attempt at hearing to explain that it really intended to propose full-time integration was properly rejected by the ALJ as a variance from its application because its amendment expressly quantified the proposal as being 30 hours. See Tr. 119-31, see also Tr. 152-53, 159-60. *Midwest Broadcasting Company*, 70 FCC 2d 1489, 1494, 45 RR 2d 1, 6 (Rev. Bd. 1979), *review denied*, FCC 79-397, released June 22, 1979.

17. Vacationland claims (Br. at 15-16) that no credit should have been awarded to Pinnacle for the participation of Mrs. Seaver because her

proposed role at the station is non-managerial in character. We agree. The record shows that Mrs. Seaver will be primarily responsible for supervising and managing the traffic and bookkeeping departments and will spend some time engaged in direct sales. Pinnacle Exh. 3, p. 1. Pinnacle has failed to show either how this role involves policy-making or how Mrs. Seaver will fill an "important role in management" which the Commission's *Policy Statement* stresses, 1 FCC 2d at 395, 5 RR 2d at 1909-10, as opposed to typical broadcast employee functions. *See Bradley, Hand and Triplett*, 89 FCC 2d 657, 661, 51 RR 2d 383, 386 (Rev. Bd. 1982) (bookkeeping not managerial); *Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1095 (Rev. Bd. 1982) (advertising saleswoman not credited); *New Continental Broadcasting Company*, 88 FCC 2d 830, 839, 50 RR 2d 1117, 1125 (Rev. Bd. 1981) (absent management and policy functions, no integration credit awarded; station comptroller credited because shown to have meaningful managerial role), *remanded on other grounds*, 53 RR 2d 1004 (1983).

18. Miracle Strip challenges (Br. at 12-13) the qualitative enhancement credit for local residence and civic participation awarded to Pinnacle because its principals' past residences and activities were not shown to be in Ft. Walton Beach. It is not disputed, however, that these activities and residences were in Pensacola, a community within the proposed service area. Consequently, we affirm the ALJ's recognition of the past residences and activities of Mr. and Mrs. Wesley and Mr. Seaver in the proposed service area, *see Waters Broadcasting Corporation*, 91 FCC 2d 1260, 1263, 52 RR 2d 1063, 1066 (1982) (service area residence credit "closely follows" community residence credit), as well as their commitment to move to Ft. Walton Beach if the Pinnacle application is granted. *I.D.*, paras. 25-30. Moreover, Messrs. Seaver and Wesley have significant past broadcast experience, *I.D.*, para. 24, and the Pinnacle proposal is slightly enhanced by the substantial-time integrated female ownership of Mrs. Wesley (15%), *Horne Industries, Inc.*, 94 FCC 2d 815, 827-28, 54 RR 2d 249, 258-59 (Rev. Bd. 1983). No enhancement credit will be awarded for Mrs. Seaver because, as explained above, her role is non-managerial. In sum, Pinnacle is awarded 70% full-time plus 15% substantial-time quantitative integration credit which is qualitatively enhanced as previously described.

19. *Da-Gon* received 73% full-time quantitative integration credit which was qualitatively enhanced by the 68% integrated ownership by a black woman plus another 5% by a black male who has extensive broadcast experience. *I.D.*, para. 57. No exceptions have been taken on this point, and we affirm the ALJ's accreditation of Da-Gon's participation proposal. *See* 47 CFR 1.277(a).

20. *Participation Summary.* The applicants have been awarded quantitative credit as follows: Vacationland, 96.4% full time; Miracle Strip and Juanina, each 100% full time; Pinnacle, 70% full time plus 15% substantial time; and Da-Gon, 73% full time. The proposals of the first three applicants are all outstanding in that they represent total or nearly total full-time integration of their ownership. But we find no clear quantitative difference between Vacationland's 96.4% full-time credit and Miracle Strip's and Juanina's 100% credit. *Compare Golden State Broadcasting Corp.*, 94 FCC 2d 212, 217 (Rev. Bd. 1983) (2% difference less than clear edge) *with New Continental Broadcasting Company, supra*, 88 FCC 2d at 850 (12.5% difference is a "clear quantitative difference.") Accordingly, these three applicants are considered equal on quantitative grounds, and the relative qualitative attributes of their participating principals will decide their ranking under this comparative factor. We do perceive a clear quantitative difference between the top three proposals on the one hand and those of Pinnacle and Da-Gon on the other. This difference is sufficiently great that the first three applicants merit a clear quantitative participation preference over the latter two, whose respective qualitative attributes cannot overcome this clear quantitative gap. *Absolutely Great, supra*, 55 RR 2d at Note 19 *citing Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981). *Compare WHW Enterprises, Inc.*, 89 FCC 2d 799, 817 (Rev. Bd. 1982), *review denied*, FCC 83-368, released September 15, 1983 (moderate preference for 100% vs. 66 2/3%) *with San Joaquin Television Improvement Corp.*, 54 RR 2d 1206 (Rev. Bd. 1983), *recon. denied*, FCC 84R-14, released February 27, 1984 (slight preference for 100% vs. 87%).

21. Since the top three applicants are equal on quantitative grounds our analysis must focus upon qualitative enhancement factors which are personal attributes of the owners such as local residence, civic activities, broadcast experience, minority and female ownership. *Absolutely Great, supra*, 55 RR 2d at 21. Vacationland's proposal is substantially enhanced by its 96.4% principal's long-time (since 1953) local residence, civic participation, and extensive broadcast experience. See para. 10 above. Miracle Strip, in turn, has a substantial enhancement credit for its 75% female ownership plus a very slight local residence credit for the proposed move of its owners to the community of license. See para. 11, above. Vacationland is qualitatively superior to and is awarded a slight participation preference over Miracle Strip because it is entitled to 96.4% enhancement credit for long-term local residence, civic participation, and broadcast experience, which outweighs Miracle Strip's credit for participating female ownership (75%) plus slight credit for proposed future local residence (100%). *See New Continental Broadcasting Co.* (Supplemental Decision), 55 RR 2d 413, 414-15 (Rev. Bd. 1983); *Radio Jonesboro, Inc.*,

FCC 84R-20, paras. 9-11, released March 21, 1984 (Rev. Bd.); and para. 22 below.

22. Juanina's proposal is qualitatively enhanced by the long-time local residence (since 1969), civic participation, and limited prior broadcast experience of its integrated 90% shareholder and by the 10% integrated ownership of its female shareholder and her proposal to move to the community of license. See paras. 13-14, above. Although both are long-term residents, because Vacationland's principal, Mr. Powell, has lived in the community for 16 more years than Juanina's Dr. Matkowski, it is entitled to a local residence preference over the latter. *Cf. Radio Greenbrier, Inc.*, 80 FCC 2d 107, 123 (Rev. Bd. 1980). Moreover, Mr. Powell's civic participation has been more extensive than Dr. Matkowski's and Vacationland therefore is also preferred under this aspect. *See Radio Jonesboro, supra* para. 21, at paras. 6-7. In sum, Vacationland is entitled to enhancement preferences on three qualitative factors, local residence, civic participation, and broadcast experience, as compared with Juanina which receives only an enhancement preference for 10% female ownership. Thus, we are not presented with a deadlocked case (*Horne Industries, Inc., supra*, 94 FCC 2d at 827) where a slight amount of minority or female ownership would tip the scales. *See Alexander S. Klein, Jr.*, 86 FCC 2d 423, 430-32 (1981) (5% minority); *Angeles Broadcasting, supra*, FCC 84R-2 at para. 29 (33% minority *and* female ownership) and *North Carolina Radio Service, Inc.*, 92 FCC 2d 621, 623 (Rev. Bd. 1982), *rev. denied*, FCC 83-211, released May 3, 1983 (49% female ownership *and* general manager). Juanina's enhancement preference for female ownership is not sufficient to equal or overcome Vacationland's combined preferences on three enhancement factors. *See Radio Jonesboro, Inc., supra.*[2]

23. *Miscellaneous Exceptions.* Vacationland excepts (Br. at 9-11) to the ALJ's determination that its threshold showing was insufficient to warrant inquiry into WFIW's allegedly superior past broadcast record. We deny this exception, first, because it is predicated on the probability of remand, which does not arise here, and, second, because the reasons given in the ALJ's Memorandum Opinion and Order, FCC 82M-2335, released July 29, 1982, are fully adequate to justify his ruling.

24. Pinnacle excepts (Br. at 6-8) to the ALJ's denial of its motion to enlarge issues seeking specification of false jurat and misrepresentation

[2] As between Miracle Strip and Juanina, we find that both applicants are well enhanced, but less so than Vacationland, and that there is no need to fine tune our analysis any further in order to choose between them. It is sufficient to find that they are in a second tier under the integration factor beneath Vacationland. Similarly, there is no need to choose between Pinnacle's 70% full-time, 15% substantial-time proposal and Da-Gon's 73% full-time proposal. These applicants are on a third tier – directly beneath Vacationland, Miracle Strip, and Juanina – and clearly out of the running.

or lack of candor issues against Juanina, Memorandum Opinion and Order, FCC 83M-170, released january 14, 1983. We deny this exception because we agree with the ALJ that Juanina adequately rebutted Pinnacle's allegations.

25. Pinnacle also excepts (Br. at 23-24) to the Initial Decision's failure to award it an auxiliary power preference and argues that its preference should exceed that awarded Vacationland. Based on the ALJ's findings of fact, *I.D.*, paras. 10, 31, both Vacationland and Pinnacle are entitled to slight preferences over the other applicants for proposing auxiliary power; however, neither is awarded a preference with respect to the other because we draw no distinction regarding quality and type of equipment used. *See Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 653, 53 RR 2d 953, 961, *recon. denied*, 94 FCC 2d 72 (Rev. Bd. 1983).

26. Da-Gon excepts (Br. at 10-13) to the ALJ's assignment of comparative demerits to it under specified ascertainment misrepresentation and public file issues. We find the ALJ's resolution of these issues (*I.D.*, paras. 44-51) to be thorough and affirm his actions. We need not pass on the magnitude of demerit assigned, however, in the specific factual context here because of the clear comparative inferiority of Da-Gon's integration proposal.

27. *Final Comparative Evaluation.* After considering all decisionally significant exceptions, we agree with the ALJ that the key decisional factor in this case is the ownership participation category under which Vacationland enjoys a slight preference over Miracle Strip and Juanina and a slight to moderate preference over Pinnacle and Da-Gon. The auxiliary power preference awarded to Vacationland slightly increases its first place position whereas the auxiliary power preference awarded Pinnacle and the comparative demerits assigned to Da-Gon do not materially affect their last-tier ranking. We therefore affirm the ALJ's ultimate conclusion that grant of Vacationland's application will best serve the public interest, convenience, and necessity.

28. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed October 11, 1983 by Prinnacle Broadcasting Corporation IS GRANTED, and the amendment IS ACCEPTED; and

29. IT IS FURTHER ORDERED, That the petition to enlarge issues and reopen the record filed November 10, 1983 by Pinnacle Broadcasting Corporation IS DENIED; and

30. IT IS FURTHER ORDERED, That the application of Vacationland Broadcasting Company, Inc. (WFTW-FM) (File No. BPH-790518AA) for authority to operate on Channel 243 at Ft. Walton Beach, Florida IS GRANTED, and the applications of Miracle Strip Communications, Inc. (File No. BPH-790509AA), Juanina, Inc. (BPH-791114AD), Pinnacle

Broadcasting Corporation (File No. BPH-791115AB), and Da-Gon Broadcasting Company, Inc. (File No. BPH-791115AI) ARE DENIED; and

31. IT IS FURTHER ORDERED, That this grant is subject to the following condition:

> Prior to commencement of operation of the improved facilities authorized herein, Vacationland Broadcasting shall certify to the Commission that it has divested itself of all interest in, and connection with, Station WFTW(AM), Ft. Walton Beach, Florida.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO *Chairman, Review Board*

FCC 83D-56

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
VACATIONLAND BROADCASTING COMPANY, INC. (WFTW-FM) Ft. Walton Beach, Florida	BC Docket No. 81-855 File No. BPH-790518AA
For Construction Permit to Make Major Changes in the Facilities of Station WFTW-FM	
MIRACLE STRIP COMMUNICATIONS, INC. Ft. Walton Beach, Florida	BC Docket No. 81-856 File No. BPH-790509AA
JUANINA, INC. Ft. Walton Beach, Florida	BC Docket No. 81-858 File No. BPH-791114AD
PINNACLE BROADCASTING CORPORATION Ft. Walton Beach, Florida	BC Docket No. 81-859 File No. BPH-791114AB
DA-GON BROADCASTING COMPANY, INC. Ft. Walton Beach, Florida	BC Docket No. 81-861 File No. BPH-79115AI
For Construction Permit for a New FM Station	

Appearances

John B. Jacob and *Dennis J. Kelly* on behalf of Vacationland Broadcasting Company, Inc. (WFTW-FM); *Lauren A. Colby* on behalf of

Miracle Strip Communications, Inc.; *Chester F. Naumowicz* on behalf of Juanina, Inc.; *Robert S. Stone* and *John S. Taylor* on behalf of Pinnacle Broadcasting Corporation; *James L. Oyster* on behalf of Da-Gon Broadcasting Company, Inc.; and *Stephen Yelverton* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOSEPH P. GONZALEZ

Issued: September 28, 1983; Released: October 7, 1983

Preliminary Statement

1. By Hearing Designation Order released December 23, 1981 (Mimeo No. BC 1215), the Chief, Mass Media Bureau, formerly the Broadcast Bureau, designated for hearing in a consolidated proceeding, the application of Vacationland Broadcasting Company, Inc. (Vacationland) for a construction permit to make major changes in the facilities of Station WFTW-FM, Ft. Walton Beach, Florida, and the following applications for a new station on Channel 243C: Miracle Strip Communications, Inc. (Miracle Strip); SJK, Inc. (SJK); Juanina, Inc. (Juanina); Prinnacle Broadcasting Corporation (Pinnacle; KY Broadcasting, Inc. (KY); and Da-Gon Broadcasting Company, Inc. (Da-Gon).[1]

2. The Hearing Designation Order designated the following issues to be tried at the hearing:[2]

(1) To determine with respect to Miracle Strip Communications, Inc.:

(a) the source and availability of additional funds over and above the $75,000 indicated; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

(2) To determine whether there is a reasonable possibility that a hazard to air navigation would occur as a result of the tower height(s) and location(s) proposed by Juanina, Inc. and Pinnacle Broadcasting Corporation.

(3) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(4) To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

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[1] The applications of SJK, Inc. and KY Broadcasting, Inc. were dismissed with prejudice by Memorandum Opinion and Orders FCC 82M-3654 and FCC 82M-2057 released on November 18, 1982 and July 2, 1982, respectively.

[2] The following issues have been renumbered. In addition, those issues designated against applicants which are no longer parties to this proceeding have been omitted in the interest of brevity.

3. After prehearing motions to enlarge issues had been filed and the responsive pleadings submitted thereto, the Presiding Judge added the following issues:

(5) To determine with respect to Juanina, Inc.:

(a) the source and availability of funds to meet estimated costs;

(b) the reasonableness of its utility cost estimates;

(c) whether in light of the evidence adduced pursuant to (a) and (b) above, the applicant is financially qualified.

(6) To determine with respect to Vacationland Broadcasting Company, Inc.:

The additional costs resulting from the changes specified in Vacationland Broadcasting Company, Inc.'s March 24, 1981 amendment, and the source and availability of funds to meet these additional costs.

(7) To determine with respect to Da-Gon Broadcasting Company, Inc.:

(a) The amount of additional cost which has resulted from the June 23, 1982 amendment to Da-Gon's engineering proposal; and the source and availability of funds to meet these added costs of construction, and, whether in light of the evidence adduced pursuant to this issue, applicant is financially qualified.

(b) Whether the application of Da-Gon Broadcasting Company, Inc. contains misrepresentations of material fact with respect to its survey of community needs and interests, and if so, the effect thereof on the basic and/or comparative qualifications of the applicant to become a licensee of the Commission.

(c) Whether applicant maintained a local public inspection file at an accessible place during regular business hours as required by Rule 73.3526(d), and, if not, the effect on its comparative qualifications.

(d) Whether applicant has failed to supply in a timely manner revised estimates of its costs of construction anticipated as a result of the specification of a new transmitter site, and if so, whether the failure to file such information constitutes a violation of Section 1.65 and 73.3514 of the Commission's Rules, and the effect thereof on its comparative qualifications.

4. By Memorandum Opinion and Order released September 17, 1982, (FCC 82M-2865), Issue 1, set forth above, was resolved in Miracle Strip's favor. Issue 5 set forth above was resolved in Juanina's favor by Memorandum Opinion and Order released September 17, 1982 (FCC 82M-2882). By Memorandum Opinion and Order released January 29, 1982 (FCC 82M-0315), Issue 2 was resolved in Juanina's favor, and by Memorandum Opinion and Order released September 17, 1982 (FCC 82M-2866), Issue 6 was resolved in Vacationland's favor.

5. Remaining for consideration here, in addition to the standard comparative issues, are the following issues specified against Da-Gon: a financial qualifications issue; an ascertainment/misrepresentation issue; a public file issue; and a Section 1.65 issue.

6. Prehearing conferences were held on March 8, 1982, May 13, 1982 and September 21, 1982. Hearing sessions regarding all issues but the ascertainment/misrepresentation issue were conducted on September 28-29, 1982 and November 18, 1982 at the offices of the Commission in Washington, D.C. A field hearing was held at Eglin Air Force Base, Florida on November 9, 1982 on the ascertainment/misrepresentation issue. The record was closed on November 18, 1982. Proposed findings of fact and conclusions of law were filed by all parties and each party submitted a reply statement.

Findings of Fact

Vacationland

7. Vacationland, a Florida corporation, is the licensee of Station WFTW(AM) and (FM), Ft. Walton Beach, Florida. By its application under consideration here, it seeks to make the following major changes in the facilities of its FM broadcast station, WFTW(FM), Ft. Walton Beach, Florida: a change in the frequency of the station from 99.3 MHz, Channel 257A to 96.5 MHz, Channel 243C; an increase in the station's power from 3 kilowatts to 100 kilowatts, and in the height of its antenna above average terrain from 170 feet to 620 feet (Vacationland Exhibit 1).

8. Vacationland presently has 310 shares of stock issued and outstanding (Vacationland Exhibit 1). Wilbur R. Powell is president and director of Vacationland, and holds 300 shares or 96.4 percent of the shares of stock. Theda K. Powell, Wilbur R. Powell's wife, is vice president and director, and holds 10 shares of stock in Vacationland or 3.6 percent (Vacationland Exhibit 2).

Diversification

9. By an amendment filed November 15, 1979 with the Commission, Vacationland has indicated that in the event that it is the successful applicant for Channel 243C, Ft. Walton Beach, it will dispose of its ownership of Station WFTW(AM), known as of November 15, 1979 as WDIS(AM), prior to commencing operation of WFTW(FM) with its improved facilities (Vacationland Exhibit 3). Neither Vacationland nor any of its principals have an ownership interest in or official position with any other broadcast station or any other instrumentality of the mass media (Vacationland Exhibit 3).

Auxiliary Power Source

10. In the event that Vacationland's application for improved facilities is granted, Vacationland will install an emergency generator at its proposed transmitter site, and an emergency generator at the studio location. In addition, Vacationland will seek licensing of its present transmission system for WFTW(FM) as an auxiliary transmitter and

antenna system, and will commit that present transmission system for WFTW(FM) to to auxiliary use (Vacationland Exhibit 4).

Wilbur R. Powell

11. Mr. Powell is president and 96.4 percent stockholder of Vacationland. He is also the chief operating officer of WFTW and WFTW(FM) (Vacationland Exhibit 5, p. 1), and works six days a week and, on occasion, seven days a week (Tr. 65, 67). Mr. Powell proposes to continue to operate and manage WFTW(FM)'s improved facilities, personally overseeing all aspects of the operation of WFTW(FM) (Vacationland Exhibit 5). Mr. Powell will devote at least 40 hours a week to his duties at WFTW(FM) (Vacationland Exhibit 5).

12. Mr. Powell was born at Crestview, Florida, and is a life-long resident of Okaloosa County, Florida which includes within its boundaries, the City of Ft. Walton Beach. Mr. Powell has been a resident of Ft. Walton Beach since 1953 (Vacationland Exhibit 5, p. 1), and is currently a member of the local chapters of the Chamber of Commerce and the Amateur Radio Club. He is a past president of the Chamber of Commerce, and is now a member of its host committee. Mr. Powell organized the Chamber of Commerce chapter at Crestview and while a resident of Crestview served on the Board of Directors of the Red Cross, the United Service Organization (USO), the Chamber of Commerce, and the Kiwanis Club, having served the latter as its president for two terms. In addition, Mr. Powell has been on the Board of Directors of the Ft. Walton Yacht Club and served as its Commodore for two years, and also served on the Honor Guard for the local Captain Billy Bowlegs Festival (Vacationland Exhibit 5, p. 2). In connection with his operation of WFTW and WFTW(FM), Mr. Powell has worked with a Ft. Walton Beach civic organization presenting and promoting its annual "Rejects and Relics" sale, with the benefits going to the poor in Okaloosa County, as well as the local chapter of the American Cancer Society. He has also developed fund raising drives for a local fire department, a local high school, and the Okaloosa County Council on Aging (Vacationland Exhibit 5).

13. Station WFTW, under Mr. Powell's leadership, has been presented with the following awards from the Florida Associated Press for Journalism: sports (1978, 1979 and 1981); investigative reporting (1978 and 1981); spot news (1979, 1980 and 1981); public affairs (1978, 1979, 1980 and 1981); documentary (1978, 1979 and 1981); feature (1978 and 1981); and first place for editorials (1964). In addition, the WFTW News Department has been cited by the Florida Associated Press for its contribution of 166 stories and 33 actualities to the Associated Press (Vacationland Exhibit 5).

Miracle Strip

14. Lois N. Marks is president, a director and 75 percent shareholder of Miracle Strip. Jack Marks, Lois Marks' husband, owns 25 percent and is secretary-treasurer, and a director (Miracle Strip Exhibits 1 and 2).

15. Mr. and Mrs. Marks reside in Columbus, Ohio, where Mr. Marks is employed as Director of Special Campaigns at Ohio State University, Columbus, Ohio. In the event that Miracle Strip is awarded the construction permit for a new FM broadcast station, Mr. and Mrs. Marks will move to Ft. Walton Beach, Florida. Mrs. Marks will be the station's full-time general manager (Miracle Strip Exhibit 1) and Mr. Marks the full-time sales manager (Miracle Strip Exhibit 2).

Diversification

16. Neither Miracle Strip nor any of its principals have any interest in nor connection with any other broadcast station, newspaper, CATV system, or other communications business, past or present (Miracle Strip Exhibit 3).

Juanina, Inc.

17. Juanina is a Florida corporation. John Matkowski is president, treasurer, director and 90 percent shareholder, and his sister, Kathryn A. Shea is vice president and 10 percent shareholder (Juanina Exhibit 1).

18. Dr. Matkowski proposes to serve as the station's full-time general manager, devoting at least 40 hours a week to the position. He will oversee all facets of the station's operation, including day-to-day programming decisions, direction of all employees, and he will have ultimate authority in all matters of station policy (Juanina Exhibit 2).

19. Mrs. Shea will be the full-time station manager/director of public service broadcasting of Juanina's proposed station, devoting at least 40 hours a week to the position. Her responsibilities will include preparation and presentation of all public service programming, and the day-to-day supervision of the station under the overall supervision of the general manager. Mrs. Shea will move to Ft. Walton Beach no later than the date Juanina commences broadcast operation (Juanina Exhibit 3).

20. Dr. Matkowski has been a resident of Ft. Walton Beach since 1969. Dr. Matkowski has been active in a number of professional health associations as well as the Ft. Walton Beach Chamber of Commerce and Elks Lodge of Ft. Walton Beach. In addition, he has been on the staff of General Hospital, and a member of the Council on Journalism (Juanina Exhibit 2).

21. Between 1957 and 1958, Dr. Matkowski was employed at a radio station in Alexandria, Virginia where he prepared program material,

created and wrote advertising, sold air time, and worked in market analysis and public relations (Juanina Exhibit 2).

Diversification

22. Neither Juanina nor any of its principals have any interest and/or association of any kind with any medium of mass communications (Juanina Exhibit 1).

Pinnacle

23. Pinnacle is a Florida corporation authorized to issue 1,000 shares of stock, 500 of which have been issued to the following individuals: William H. Seaver, president and director, holds 175 shares or 35 percent; James W. Wesley, vice president and director, 175 shares or 35 percent; Wilma S. Seaver, treasurer and director, 75 shares or 15 percent; and Brenda C. Wesley, secretary and director, 75 shares or 15 percent (Pinnacle Exhibit 1).

24. Mr. Seaver and Mr. Wesley propose to devote a minimum of 40 hours a week to their duties at the station. Mr. Seaver will serve as general manager, announcer and salesman and Mr. Wesley as sales manager and news director. Both Mr. Seaver and Mr. Wesley have had extensive broadcast experience which began when they were both students and has continued to the present. Mrs. Seaver and Mrs. Wesley will each devote a minimum of 30 hours a week to the station. Wilma Seaver will act as traffic director, bookkeeper and salesperson and Brenda Wesley will act as public affairs director and salesperson (Pinnacle Exhibit 1).

25. Mr. Seaver lived in Pensacola, Florida from 1968 to 1979, and during that time participated in community activities in the Pensacola area. He served on the publicity committee for community projects sponsored by the Jaycees, and in 1974 served on the publicity committee for the Northwest Florida United Way, producing radio announcements for the organization. In 1974, he served as television emcee for the Northwest Florida March of Dimes Telethon on Channel 3 in Pensacola. In addition, he served as treasurer for the Miracle Strip Chapter of the Florida Public Relations Association in 1975, and hosted the Florida State Public Relations Convention in Ft. Walton Beach, Florida. He was also a member of the Florida Association of Broadcasters from 1976 through 1979, and served on the Planning and Publicity Committee for the Pensacola Chamber of Commerce from 1977 through 1979 (Pinnacle Exhibit 2).

26. In 1978, Mr. Seaver served as vice president of the Pensacola Broadcasters Association, and was in charge of inviting guests and community leaders to meetings for the purpose of FCC ascertainment requirements. In 1979, he served as president of the association, and also

served on the Advisory Board for public television station WSRE-TV, Pensacola, Florida. From 1969 through 1979, Mr. Seaver covered the approach of Hurricane Camille and other hurricanes along the Gulf Coast. He assisted in the planning of and operation of the FCC Emergency Broadcast System Plan and the Escambia County Emergency Operations Plan with local civil defense officials. The Pensacola area EBS System included Escambia, Santa Rose and Okaloosa Counties. While a resident of Pensacola, Mr. Seaver was a member of the Cokesbury United Methodist Church and Summit Park United Methodist Church in Pensacola (Pinnacle Exhibit 2).

27. Mrs. Seaver assisted in the coordination of the Great Gulf Coast Arts Festival, and in 1978, served as co-chairman of the Arts Festival and as its chairman in 1979 (Pinnacle Exhibit 3).

28. Mr. Wesley was born in DeFuniak Springs, Florida, and attended school in Pensacola, Florida. While living in Pensacola, Mr. Wesley was a member of the Pensacola Country Club and attended several meetings of the Pensacola Kiwanis, although he was not a member. He was a member of the "Gopher Club", which involved monthly breakfast meetings with the Pensacola mayor, city council members, and business leaders, where community matters were discussed and speakers appeared (Pinnacle Exhibit 5).

29. Mrs. Wesley in 1979 was a member of the Pensacola Junior Womens League (Pinnacle Exhibit 4).

30. Mr. and Mrs. Seaver and Mr. and Mrs. Wesley will move to Ft. Walton Beach in the event that Pinnacle is the successful applicant (Pinnacle Exhibits 3 and 4).

Auxiliary Power

31. Pinnacle will acquire and utilize an emergency power generator for both its studio and transmitter site (Pinnacle Exhibit 1).

Diversification

32. Neither Pinnacle, nor any of its officers, directors or shareholders have any ownership interest, legal or beneficial, direct or indirect, in any existing outlet of mass communications, except for the shares held by William Seaver and James W. Wesley in Mooney Broadcasting Corporation, the combined total of which is less than one percent of the stock of the corporation (Pinnacle Exhibit 1).

Da-Gon

33. Da-Gon is owned 89 percent by Brenda Bandy, 5 percent by Victor Venters, 5 percent by John Paul Stroup and 1 percent by Sharona Campbell. For comparative purposes, Mrs. Bandy's interest in Da-Gon is considered to be 68 percent (Da-Gon Exhibit 1).

34. Mrs. Bandy, a black female, is executive vice president and proposes to serve as operations manager on a full-time basis. Victor Venters, a black male, is also a vice president, and will serve as full-time general manager (Da-Gon Exhibit 1).

Victor Venters

35. Mr. Venters has extensive broadcast experience (Da-Gon Exhibit 1).

Diversification

36. Neither Da-Gon nor any of its principals have any interest in any medium of mass communications (Da-Gon Exhibit 1).

Conclusions of Law

Financial Issue

37. The Hearing Designation Order released in this proceeding on December 23, 1981 found Da-Gon to be financially fit. At that time, Da-Gon had projected its total estimated first year (3 months) costs to amount to $82,967 (FCC Form 301, Exhibit 3), and as evidence of the availability of sufficient funds to meet these costs, it submitted a loan commitment letter from Planitt Financial Services Incorporated dated November 8, 1978 (FCC Form 301, Exhibit 3, Attachment 2) in the amount of $85,541, supported by a balance sheet for Planitt dated August 31, 1979 (FCC Form 301, Exhibit 3, Attachment 2). Da-Gon noted at the time that Planitt has $199,229 in cash, against current liabilities of $113,688, and that it therefore has sufficient funds to loan the applicant $85,541 (FCC Form 301, Exhibit 3).

38. The financial issue under consideration here was designated by the Presiding Judge against Da-Gon pursuant to petitions to enlarge the issues in this proceeding filed by certain parties to this proceeding.[3] In designating the issue, the Presiding Judge noted that Da-Gon had amended the engineering portion of its application on June 26, 1981 to reflect a new tower and transmitter site; that Da-Gon's estimate of an increase in costs of $25,000 for these changes was, in his opinion, patently unrealistic; and that the designation of a cost estimate/funds availability issue was therefore warranted so that a determination could be made as to the amount of the increase in Da-Gon's anticipated costs resulting from the aforementioned engineering amendment, as well as the source of these additional funds.

39. At a hearing session held on November 18, 1982,[4] a number of

[3] Juanina, SJK, Inc. and Pinnacle.

[4] By Order released October 8, 1982 (FCC 82M-3115), a special session was held on November 18, 1982 to try the financial issue in response to a claim of surprise by Da-Gon

documents were received into evidence as Da-Gon Exhibit 2. Included among these documents is an unsigned one page statement titled "Financial Issue" in which it is represented that the cost to Da-Gon of increasing the height of its tower is approximately $180,000, a figure derived from estimates provided by The Utility Tower Company; and that based on a lease financing arrangement with its equipment supplier, payments for five months would increase from $13,415 to $34,119, resulting in an additional expense of $21,000 to finance the added $180,000 in equipment costs. The financial statement indicates further that the figure of $21,000 for added equipment expense when added to an estimated $4,000 required to secure the land, amounted to a total increase in costs of $25,000, the figure reported by Da-Gon to the Commission, increasing its original cost estimate of $82,967 to $107,967; and that the source of funds to meet these added costs is a loan commitment in the amount of $125,000 from Planitt, as evidenced by the letter from Planitt dated April 12, 1982 submitted as part of its June 23, 1982 amendment. Da-Gon included as part of Da-Gon Exhibit 2, a subsequent letter from Planitt dated September 22, 1982, in which its Chairman of the Board and Chief Executive Officer indicates that Planitt is prepared to loan Da-Gon $175,000 for the construction of the FM radio station in Ft. Walton Beach.

40. Da-Gon also submitted, as part of Da-Gon Exhibit 2, a letter dated September 28, 1982, from John Harper, who identifies himself as a McMartin Dealer. Mr. Harper states therein that increasing the tower height to 690 feet would result in an additional expense of $180,000, and that this added cost would result in an increase in the payment schedule of approximately $15,000 with a contingent order. The letter from Mr. Harper refers to a down payment of 25 percent of the total contract as being required for a firm order for shipment and installation, and the balance of 75 percent to be made as set forth in a previous letter. Mr. Harper indicates that in the event that a leasing arrangement is used, the down payment required would be the amount of two monthly payments. The actual amount in dollars represented by these percentages is not disclosed.

41. The Presiding Judge concludes that Da-Gon has failed to meet its burden of proof under the financial issue, and that a finding adverse to Da-Gon on this issue is required. The evidence submitted by Da-Gon in support of its claim that costs would increase by $180,000 is deficient. Similarly, it has failed to substantiate its claim that it has sufficient funds available to meet these added costs. There is no supporting documentation with respect to The Utility Tower Company's estimate of $180,000 to

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with respect to its obligations under this issue. The Order setting the special hearing session specifically advised Da-Gon that it would have both the burden of going forward on this issue and the burden of proof.

cover the cost of increasing the height of the tower, and Mr. Harper, the McMartin Dealer, although he quotes the same figure of $180,000 in his letter dated September 28, 1982, refers to it as the cost of increasing the tower's height, without indicating whether or not this figure is all inclusive, that is whether it includes all of the costs resulting from Da-Gon's engineering amendment, or whether it represents, as stated, simply the cost of increasing the height of the tower. Although the figure may in fact include all attendant costs incurred by Da-Gon as a result of the amendment to its engineering proposal, the letter does not say so. A cost estimate issue requires that a party come forward with more in the way of a detailed breakdown of the anticipated increase in costs than the mere quote of a dollar figure identified simply as the cost of increasing the height of the proposed antenna tower.

42. Although Da-Gon submitted a letter of commitment from Planitt, it failed to submit a current balance sheet for Planitt demonstrating its ability to meet the increased loan commitment. Planitt has not been shown to be a bank or other financial institution. Therefore, in the absence of a showing that Planitt has sufficient liquid assets to meet this commitment, no weight can be given to its loan commitment.

43. Da-Gon was given ample opportunity to address the financial issue in this proceeding. It failed to submit sufficient evidence to establish its claim that its estimate of increased costs was reasonable, or that Planitt is in a position to lend it the additional funds required. Its half-hearted attempt to meet its burden, apparently in the belief that the "certification" by its president as to Da-Gon's financial qualifications was sufficient was ill advised. Accordingly, the Presiding Judge concludes that Da-Gon has failed to establish its financial qualifications and its application will be dismissed with prejudice. However, in the event that this ruling is overturned on appeal, Da-Gon'a application will be considered comparatively along with those of the other applicants.

Ascertainment/Misrepresentation Issue

44. Juanina, in going forward on the ascertainment/misrepresentation issue, presented the following witnesses: John Gontarek, Kenny Mauldin, Phyllis Morgan Daws, John Blackburn, Eugene K. Aderhold, Daniel Houghton, Anita Kroha, Irene Alexander, Robert G. Burnes, George Rittenhouse, Thomas Woodcock, Mrs. Ron Calhoun, and, finally, Dr. Matkowski. Of these witnesses, Mr. Mauldin, Ms. Daws, Mr. Blackburn, Mr. Houghton, Ms. Alexander, Ms. Kroha and Mrs. Calhoun were purportedly interviewed by Da-Gon as part of its ascertainment survey (FCC Form 301, Exhibit 5, Attachment 2).

45. Mr. Mauldin indicated at the hearing that he was mistaken when he indicated earlier in his affidavit (Juanina Exhibit 9) that he had not

been interviewed by Mr. Bandy (Tr. 290). However, he later qualified this statement by stating that he could not be absolutely certain that he had been interviewed by Mr. Bandy (Tr. 294). He subsequently admitted that he had a bad memory (Tr. 305). Mr. Houghton could not recall being interviewed by either Mr. Venters or Mr. Bandy (Tr. 362). Mrs. Morgan Daws testified that to the best of her knowledge she does not recall meeting or being interviewed by Mr. Bandy or Mr. Venters (Tr. 313-314, 320-321), although she indicated that there were different people coming through on ascertainment surveys (Tr. 313). Similarly, Mr. Blackburn did not recognize Mr. Bandy (Tr. 327), could not recall being interviewed by anyone (Tr. 328), but was unable to say for a certainty that he had not been interviewed (Tr. 330), noting that it was several years back (Tr. 332). Mrs. Alexander indicated that she remembered being interviewed by Mr. Bandy (Tr. 389), but denied that she was a civic worker, as reported by Da-Gon on its ascertainment sheet (Tr. 388). Ms. Kroha, although she denied being president of the Chamber of Commerce (Tr. 385), remembered being interviewed by a black person (Tr. 381), but could not swear that it was Mr. Bandy (Tr. 381). Mrs. Calhoun, whom Da-Gon represented as having been interviewed in person, testified that she received a phone call from a caller who asked questions about community needs and problems, but was never contacted face to face (Tr. 422); and that she informed the caller that she had no authority to speak for the Daughters of the American Revolution and then hung up the phone (Tr. 422).

46. Mr. Gontarek, a past president of the Ft. Walton Beach Elks Club, testified that C.W. Money was not the Exalted Ruler of Ft. Walton Beach Lodge 1795 or an officer of the Lodge as reported by Da-Gon on its Ascertainment of Leaders Sheet, but was the Kitchen Manager at the Lodge and a paid employee of the Lodge (Tr. 284). Eugene Aderhold indicated, during the course of his testimony, that he was Veterans County Service Officer in 1979, working for the County under VA regulations (Tr. 339), and that he did not know and had never heard of a Beverly Robson, whom Da-Gon listed as a Veterans Service Officer (Tr. 339, 348). Robert G. Burnes testified that in 1979, he was the manager of the Ft. Walton Beach Humane Society (Tr. 395). He identified Barbara Bush as the manager of the Okaloosa Kennel Club, and not the director of the Okaloosa County Animal Control Center as reported by Da-Gon in its ascertainment survey (Tr. 396). George Rittenhouse, who identified himself as the Director of Adult Services of the Association of Retired Citizens of Okaloosa County (Tr. 405), indicated that he knew a Mrs. M. Monty who was neither a director nor a staff member of the Association in 1979, as reported by Da-Gon, but the mother of a client at a sheltered workshop (Tr. 405-408). Finally, Thomas Woodcock, who is in charge of all Salvation Army operations in the Ft. Walton Beach area (Tr. 413), testified

that he had access to the records of the Salvation Army (Tr. 414), and that by searching these records, determined that a Leon Jones had never served as an officer/supervisor for the Salvation Army, as reported by Da-Gon, but that he had been a beneficiary (Tr. 414, 417). He indicated, however, that a beneficiary may be assigned the duty of signing in transients at night (Tr. 415).

47. Dr. Matkowski's testimony that he was unsuccessful in contacting a number of individuals and/or organizations[5] listed by Da-Gon as sources for its ascertainment of public needs and interests in the Ft. Walton Beach area is not considered probative, and will therefore be given no decisional weight. Similarly, his testimony to the effect that certain other individuals[6] reported by Da-Gon as being among those community leaders interviewed, denied being interviewed, but would not sign affidavits to that effect, is also found to be of no probative value and will be disregarded.

48. Mr. Bandy testified that all of Juanina's witnesses appearing at the hearing, with the exception of Mrs. Calhoun, whom Da-Gon represented as having been interviewed as part of its ascertainment survey, were in fact interviewed in person (Tr. 460-461). Although Mr. Bandy acknowledged that Da-Gon's survey material reported that the interview with Mrs. Calhoun had taken place in person, he admitted that it had taken place over the phone, and he attributed the error to the use of an incorrect interview sheet (Tr. 507). With respect to the error regarding Mr. Money's position, Mr. Bandy explained that Mr. Money was introduced to him as the Manager of the Elks Lodge 1795, and the typist, in "transposing", apparently listed him as president (Tr. 463). The error with respect to Leon Jones occurred, according to Mr. Bandy, because Leon Jones identified himself to him at the Salvation Army's local headquarters as the Office Manager, indicated that he was the only one there, and then agreed to be interviewed (Tr. 483). As to the error in listing Irene Alexander as a civic worker, Mr. Bandy testified that when preparing the survey sheet, he couldn't remember Ms. Alexander's exact position, but believed it to be that of a civic worker and he listed her as such (Tr. 468). He was unable to explain how the error occurred with respect to Barbara Bush, but believes it was a "transposition error" (Tr. 489).

49. The evidence of record fails to demonstrate that Da-Gon deliberately sought to misrepresent to the Commission any facts on its ascertainment survey. None of the witnesses, with the exception of Ms. Alexander who remembered being interviewed by Mr. Bandy, were able to state with any certainty whether or not they had been interviewed by a

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[5] Alier Robinson, Thelma Mace/New Neighbors Club, Bill Hanners, and Andy Dearth/Medical Rehabilitation Institute.

[6] Joseph Ancona and R. G. Sigman.

representative of Da-Gon. The fact that the interviews reportedly occurred several years before the date of the execution of the affidavits and the hearing session in Ft. Walton Beach may very well account for the inability of these witnesses to recall whether or not the interview had occurred or the substance of the interview. The Presiding Judge concludes therefore that Da-Gon is entitled to the benefit of the doubt expressed by all of the witnesses, and he specifically finds that the interviews reported by Da-Gon did in fact occur.

50. The evidence of record demonstrates that a number of misstatements and/or errors occurred in conducting and reporting the ascertainment survey which reflect negatively on Da-Gon's comparative qualifications. Several witnesses were improperly identified and one witness was reported as having been interviewed in person, when the interview actually took place over the phone. Such inattention to detail displays a disregard for the accuracy of the information supplied to the Commission which cannot be condoned, and indeed reflects adversely on Da-Gon's ability and/or willingness to meet the requirements of the Commission. Accordingly, the Presiding Judge finds that the assessment of a comparative demerit against Da-Gon is warranted under this issue.

Public File Issue

51. No evidence was introduced with respect to this issue other than the evidence offered by Dr. Matkowski. The allegations made by Dr. Matkowski that Da-Gon's public file, on three separate occasions, was not readily accessible to the general public remain uncontroverted. Rule 73.3526 of the Commission's Rules requires not only that such a file be maintained, but that the public have easy access to the file. The uncontroverted testimony of Dr. Matkowski indicates that this was not the case on three separate visits (Juanina Exhibit 4). Therefore, the imposition of a comparative demerit against Da-Gon under this issue is warranted.

Section 1.65 Issue

52. No evidence was presented with respect to this issue by the party having the burden of going forward on the issue. Accordingly, this issue will be resolved in Da-Gon's favor.

Diversification

53. Neither Miracle Strip, Da-Gon or Juanina, nor any of their principals have any ownership interests, legal or beneficial, direct or indirect in any existing outlet of mass communications.

54. Vacationland presently owns WFTW(AM) in addition to Station WFTW(FM), which it presently seeks to upgrade. It has, however, made a firm commitment to dispose of its ownership of the AM station prior to

commencing operation of WFTW(FM) with its improved facilities. Therefore, for comparative purposes, Vacationland is considered as not owning any other existing outlet of mass communications. See *WHW Enterprises, Inc.*, 89 FCC 2d 799 (Rev. Bd. 1982).

55. The Presiding Judge further finds that the other applicants are not entitled to a diversification preference over Vacationland on the basis that they are newcomers to the Ft. Walton Beach area and Vacationland is an existing licensee seeking to merely upgrade its existing FM facility. To do so would unfairly penalize an existing licensee, denying it the opportunity to be compared on an equal footing with the other applicants. In the absence of evidence indicating that Vacationland will either continue to operate Station WFTW(FM) on 99.3 MHz if one of the other applications is granted, or that a newcomer would be unlikely to seek the vacated frequency if the Vacationland application is granted, the Presiding Judge finds that it cannot be assumed that one of the other applications must be granted if diversification is to be maximized. Accordingly, no diversification demerit will be assessed against Vacationland. See *Valdosta Broadcasting Co. et al.*, 11 FCC 769 (1946) and *Julie P. Miner* v. *FCC*, 663 F.2d 152, 48 RR 2d 1069 (D.C. Cir. 1980).

56. The only applicant with any chargeable media interests is Pinnacle.[7] Messrs. Seaver and Wesley jointly own less than one percent of the stock in Mooney Broadcasting which owns the following stations: WERC(AM), Birmingham, Alabama, WKXX(FM), Birmingham, Alabama; WLUY(AM), Nashville, Tennessee; WYHY(FM), Lebanon, Tennessee; WSEV(AM), Sevierville, Tennessee, and WMYU(FM), Sevierville, Tennessee (Pinnacle Exhibit 1; Tr. 149). They have no other interests in any other media of mass communications. The media interests of Messrs. Seaver and Wesley, even when combined, are too minimal to have any meaningful impact on diversification of the mass media. See *Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (Rev. Bd. 1982) and *Pittsfield Community Television Association*, FCC 83R-61, released August 31, 1983. No diversification credit will therefore be given to any of the applicants on the basis of Messrs. Seaver and Wesley's ownership of Mooney Broadcasting stock.

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[7] In an amendment submitted before the so-called B cut-off date, Messrs. Wesley and Seaver indicated that they [were] "willing to divest themselves of such interests in Mooney Broadcasting Corporation upon grant of construction permit so as to remove diversity impediments, if any." The Presiding Judge finds that the statement does not constitute a firm commitment on the part of Messrs. Seaver and Wesley to divest themselves of these media interests. Accordingly, for comparative purposes, Pinnacle is charged with these media interests.

Integration

Da-Gon

57. Brenda Bandy, who for comparative purposes owns 68 percent of the stock in Da-Gon, will be integrated into the management of the proposed station on a full-time basis, serving as the station's executive vice president and general manager. Victor Venters, who owns 5 percent of Da-Gon's stock, will be integrated full time as the station's vice president and general manager. Da-Gon is therefore entitled to a full-time quantitative integration credit of 73 percent. Da-Gon's quantitative integration credit is qualitatively enhanced by the fact that Mrs. Bandy is a black female, and Mr. Venter's quantitative integration credit is enhanced by the fact that he is also black and by the additional fact that he has had extensive broadcast experience.

58. Da-Gon's comparative standing vis-a-vis the other applicants is diminished by the errors contained in its ascertainment survey and by its failure to maintain on three separate occasions, its public file in a place easily accessible to the general public in violation of Section 73.3526 of the Commission's Rules.

Miracle Strip

59. Miracle Strip is entitled to a quantitative full-time integration credit of 100 percent. The 75 percent full-time quantitative integration credit for Mrs. Marks is qualitatively enhanced by the fact that she is a female, and by her intention to move to Ft. Walton Beach, and Mr. Marks' 25 percent full-time quantitative integration credit is enhanced by the fact that he also proposes to move to Ft. Walton Beach in the event that Miracle Strip is the successful applicant.

Juanina

60. Juanina is entitled to a 90 percent full-time integration credit for Dr. Matkowski and a 10 percent full-time integration credit for his sister' Mrs. Shea. Although questions have been raised by those opposing a 90 percent full-time integration credit for Dr. Matkowski as to his ability to meet this commitment, the Presiding Judge finds that although his back problem has interfered with his ability to practice dentistry, preventing him from standing for long periods of time (Tr. 193), there has been no showing that it will in any way prevent him from carrying out his proposed duties at the station on a full-time basis. Similarly, there has been no showing on the record that Dr. Matkowski's ulcers will interfere in any way with his projected duties.

61. Juanina's claim of a quantitative full-time integration credit of 10 percent for Mrs. Shea is also disputed on the basis that Mrs. Shea is not qualified to assume her proposed duties. Mrs. Shea has indicated that she

will move to Ft. Walton Beach in the event that Juanina is the successful applicant. Although her prior professional life has been in nursing, as a registered nurse, there has been no showing in the record that Mrs. Shea is incapable of performing her projected duties in a satisfactory manner or that her integration proposal is in any way unrealistic.

62. Juanina's full-time quantitative integration credit of 90 percent for the integration of Dr. Matkowski is qualitatively enhanced by the fact that Dr. Matkowski is a long-term resident of Ft. Walton Beach who has participated in the civic affairs of that community. It is further enhanced to a very slight degree by Dr. Matkowski's very limited amount of prior broadcast experience. The 10 percent full-time quantitative integration credit for Mrs. Shea is enhanced by her sex and by her intention to move to Ft. Walton Beach in the event that Juanina is the successful applicant.

Vacationland

63. Mr. Powell will be integrated on a full-time basis in a managerial role in the upgraded station. Although he owns only 96.4 percent of the stock in Vacationland, his wife owns the remaining 3.6 percent. Under the rationale of *Absolutely Great Radio, Inc.*, FCC 83R-9, released February 4, 1983 and *Thomas C. and Bessie L. Collins*, FCC 83R-11, released February 17, 1983, Vacationland is entitled to a 100 percent full-time integration credit for Mr. Powell.

64. As of the date of the hearing, Mr. Powell was 70 years old (Tr. 74) and was suffering from arthritis and walking with the aid of a cane (Tr. 75). It is argued by those opposing a full-time integration credit for Mr. Powell, that his age and the state of his health require a finding that his full-time integration proposal is unrealistic. Mr. Powell testified that he presently works full time at his radio stations (Tr. 65) and intends to continue to do so (Tr. 69). There is no evidence of record that Mr. Powell's age or health will in any way interfere with this commitment.

65. Vacationland's quantitative integration credit of 100 percent is qualitatively enhanced by the fact that Mr. Powell is a lifelong resident of Okaloosa County, Florida and a long-term resident of Ft. Walton Beach, Florida. In addition, Mr. Powell has been involved in community affairs of the Ft. Walton Beach-Crestview, Florida area, and has had extensive broadcast experience.

Pinnacle

66. Messrs. Seaver and Wesley, both of whom own 35 percent of the Pinnacle stock, intended to be integrated full time. The remaining 30 percent of Pinnacle's stock is owned by the spouses of Messrs. Seaver and Wesley, both of whom own 15 percent of the stock. The Presiding Judge finds, therefore, that for comparative purposes, Pinnacle is considered as proposing 100 percent full-time integration. See *Absolutely Great Radio,*

Inc., supra, and *Thomas C. and Bessie L. Collins, supra.* Although Mrs. Seaver and Mrs. Wesley will each be devoting 30 hours a week to the proposed station performing duties which are managerial and/or policy-making in nature,[8] no substantial quantitative integration credit will be awarded Pinnacle for the proposed integration of Mrs. Seaver and Mrs. Wesley since the full 100 percent quantitative interest has been exhausted. See *Absolutely Great Radio, Inc., supra.* Pinnacle's 100 percent quantitative integration credit is enhanced by the fact that both Messrs. Seaver and Wesley have had prior contact with the West Florida Gulf Coast area, which included, in the case of Mr. Seaver, an active participation in the community affairs of the Pensacola, Florida area. In addition, the Messrs. Seaver and Wesley's quantitative integration credit is further enhanced by their extensive broadcast experience and by their intention to move to Ft. Walton Beach in the event that Pinnacle is the successful applicant. Since only the quantitative integration credit of Messrs. Seaver and Wesley is being considered, Pinnacle's integration proposal is not entitled to any further enhancement because of its intention to integrate the two women, Mrs. Seaver and Mrs. Wesley, into the management of the station.

Auxiliary Power

67. Both Vacationland and Pinnacle are entitled to a slight preference over Miracel Strip, Juanina and Da-Gon for their proposal to employ an auxiliary power system.

Ultimate Findings

68. Da-Gon's quantitative integration credit is substantially less than that awarded the other four applicants. In addition, although it is enhanced in the manner described above, its overall comparative standing vis-a-vis the other applicants is diminished by a substantial demerit for the errors in its ascertainment survey and its violation, on three separate occasions, of Section 73.3526 of the Commission's Rules. The Presiding Judge finds, therefore, that of the five applicants, Da-Gon ranks last.

69. All of the four remaining applicants propose 100 percent full-time integration. The decision as to which proposal will best serve the public interest will therefore turn on the extent to which each separate proposal is qualitatively enhanced.

70. Of special importance among those factors which enhance a quantitative integration credit are local ownership and civic participation, and minority and female ownership. See *Waters Broadcasting Corporation,* 88 FCC 2d 1204 (Rev. Bd. 1981).

[8] Mrs. Seaver's proposed position as supervisor of the traffic and bookkeeping departments is clearly managerial.

71. The Presiding Judge finds that Vacationland's proposal will best serve the public interest. As noted above, it proposes 100 percent full-time integration of local ownership into management, which is further enhanced by Mr. Powell's participation in the civic affairs of the Ft. Walton Beach/Crestview area. In addition, its proposal is further enhanced to a slight degree by Mr. Powell's extensive broadcast experience. Although Juanina also has local ownership, which is also enhanced by Dr. Matkowski's involvement in the civic affairs of the Ft. Walton Beach community, only 90 percent of its ownership is so enhanced. Although 10 percent of Juanina's quantitative integration is enhanced by Mrs. Shea's sex, the Presiding Judge finds that this factor does not overcome Vacationland's preference for 100 percent full-time integration of local ownership. In addition, Vacationland is entitled to a slight preference over Juanina because of its intention to employ an auxiliary power source as well as a very slight preference over Juanina because Mr. Powell has considerably more broadcast experience than Dr. Matkowski.

72. Although the remaining two applicants also propose 100 percent full-time integration, neither applicant has local or minority ownership. It is the opinion of the Presiding Judge that the qualitative enhancements to which they are entitled do not outweigh the preference for local ownership to which both Vacationland and Juanina are entitled.

73. Accordingly, the Presiding Judge ranks in first place, the proposal of Vacationland, in second place that of Juanina, in third place Pinnacle,[9] in fourth, Miracle Strip, and finally Da-Gon.

Rulings

74. IT IS ORDERED that the application of Da-Gon Broadcasting Company, Inc. (BC Docket No. 81-861, File No. BPH-791115AI) for a construction permit for a new FM radio station in Ft. Walton Beach, Florida IS DISMISSED WITH PREJUDICE.

75. IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R., the application of Vacationland Broadcasting Company, Inc. (WFTW-FM) (BC Docket No. 81-855, File No. BPH-790518AA) for a construction permit to make major changes in the facilities of Station WFTW-FM IS GRANTED; and the applications of Miracle Strip Communications, Inc. (BC Docket No. 81-856, File No. BPH-790509AA), Juanina, Inc. (BC Docket No. 81-858, File No. BPH-

[9] Pinnacle's application is ranked ahead of Miracle Strip on the basis that its integrated principals have had prior extensive contacts with the West Florida Gulf Coast area, and in the case of Mr. Seaver, participated to a significant degree in civic affairs of the Pensacola, Florida area. In addition, their proposal is further enhanced to a slight degree by the Messrs. Seaver and Wesley's extensive broadcast experience.

791114AD), and Pinnacle Broadcasting Corporation (BC Docket No. 81-859, File No. BPH-791115AB) for a construction permit for a new FM station in Ft. Walton Beach, Florida ARE DENIED.[10]

76. AND IT IS FURTHER ORDERED that the Motion to Reject Amendment filed by Juanina, Inc. on July 13, 1983, the Motion to Strike filed by Vacationland Broadcasting Company, Inc. on July 14, 1983, and the Motion to Strike filed by Miracle Strip Communications, Inc. on July 15, 1983 ARE DISMISSED, since the pleading to which the motions are directed is not before the Presiding Officer.[11]

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH P. GONZALES *Administrative Law Judge*

[10] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

[11] On July 5, 1983, Da-Gon Broadcasting Company, Inc. filed a pleading titled "Amendment" with the Office of the Secretary, with a copy to the Presiding Judge.